United States Court of Appeals for the Second Circuit



APPENDIX

74 1845

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCINE NEWMAN,

Appellant,

-against-

T-3291

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Respondent.

APPELLANT'S RECORD ON APPEAL

Cene Ann Condon Actorney for Appellant 26 West 11th Street New York, New York 10011 (212) 674-6920



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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

FRANCINE NEWMAN.

Plaintiff.

-against-

73 Civil 473

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK.

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Francine Newman, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 19th day of February, 1974.

Dated: New York, New York March 12, 1974

Gene Ann Condon Attorney for Plaintiff 26 West 11th Street New York, New York 10011 (212) 674-6920

TO:

Clerk of the United States District Court Eastern District of New York

Norman Redlich, Esq.
Corporation Counsel, City of New York
Attorney for Defendant
Municipal Building
New York, New York 10007

| UNITED | STATES | DI | STRI | CT | COURT |
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FRANCINE NEWMAN,

Plaintiff.

JUDGMENT OF THE DISTRICT COURT

-against-

73C473

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant.

A Decision and Order of Honorable Anthony J. Travia, United States District Judge, having been filed on February 15, 1974, granting defendant's motion for summary judgment, it is

ORDERED and ADJUDGED that summary judgment is

atered in favor of the defendant and against the plaintiff on
the ground of res judicata and the complaint is dismissed.

Dated: Brooklyn, New York
February 19, 1974

s/ Lewis Orgel
CLERK

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

-----x

FRANCINE NEWMAN,

Plaintiff, :

73-C-473

- against -

DECISION AND ORDER

THE BOARD OF EDUCATION OF THE CITY :

SCHOOL DISTRICT OF NEW YORK,

February 15, 1974

Defendant.

TRAVIA, D. J.

Defendant makes application to this court, seeking summary judgment dismissing the plaintiff's complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds of (1) res judicata and (2) plaintiff's failure to state a claim upon which relief can be granted. In the alternative, defendant requests a stay of this action, pending the resolution of the uncompleted state court proceedings.

Plaintiff was employed as a health education teacher by the Board of Education of the City School District of New York [hereinafter "The Board"] and was assigned in that capacity to the Far Rockaway High School. On January 26, 1970, David Gordon, then principal of the high school and plaintiff's supervisor, wrote to the Superintendent of Schools, in accord-

and with the provisions of Section 2568 of the New York Educa/1
tion Law, requesting that a medical examination be given to
the plaintiff to determine her mental capacity to perform her
/2
pedagogic duties. Plaintiff was requested to submit to a
series of examinations which were subsequently conducted on
February 13, 1970, February 25, 1970 and April 13, 1970, by
two physicians, a psychiatrist and a psychologist. By a memo-

^{/1} Section 2568 reads:

[&]quot;The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement."

^{/2} The request was accompanied by a report setting forth the facts justifying the principal's request. The state court found that there was sufficient evidence to warrant the request for a medical examination.

randum submitted to Deputy Superintendent Lang, it was recommended that the plaintiff was not presently fit for her teaching duties and that she should be placed on a leave of absence for purposes of health improvement for that school year, i.e., September 11, 1970 through June 30, 1971. The recommendation was adopted by the Superintendent and plaintiff was advised that her cumulative absence reserve was sufficient to cover the number of school days involved.

On September 8, 1971 plaintiff requested a medical examination to ascertain whether she could return to her teaching duties for the following school year, i.e., September 10, 1971 to June 30, 1972. She was examined by various physicians and a psychiatrist on October 18, 1971, November 18, 1971 and November 29, 1971. It was medically concluded that plaintiff be again placed on a leave of absence for that school year. By a letter dated January 18, 1972, plaintiff was advised of this determination. Plaintiff's cumulative absence reserve was sufficient to cover her absences only up to October 7, 1971 and, thereafter, her leave of absence would be without compensation.

Plaintiff requested a review of the medical determination by an ad hoc committee of physicians, pursuant to Article IV of the Collective Agreement between the Board and the United Federation of Teachers. This request was heard by a hearing officer and subsequently denied by the Superintendent on October 20, 1971. Subsequently, the United Federation of Teachers, on behalf of the petitioner agreed to submit the matter to an arbitrator. The arbitrator's award denied the demand for an ad hoc committee review.

On March 1, 1972, the plaintiff commenced a proceeding in the New York State Supreme Court, Kings County, pursuant to Article 78 of the New York Civil Practice Law and Tules. In substance, the plaintiff sought a court order:

- (1) directing the Board to restore her to active teaching duty;
- (2) directing the Board to rescind its order of July 31, 1970, placing the plaintiff on a forced medical leave of absence from September 11, 1970 through June 30, 1971;
 - (3) directing the Board to rescind its order of

^{/3} It should be noted that the plaintiff could have elected to appeal the Superintendent's determination to the Commissioner of Education pursuant to Section 310 of the raised any constitutional objections to the procedure utilized under Section 2568. Op. Dep't of Ed., 62 St. Dep't 57 (1939); see Application of Ross, 284 App. Div. 522, 132 N.Y.S. 2d 760 (3d Dept.), reversed on other grounds, 308 N.Y. 605, 127 N.E. 2d 697 (1954).

January 18, 1972, placing plaintiff on a forced leave of absence from September 10, 1971 through June 30, 1972;

- (4) commanding that the plaintiff's accumulated sick leave days be restored to her for the days between September 11, 1970 through June 30, 1971 and the sum paid to her be credited against the salary due her rather than against her sick leave;
- (5) commanding that the plaintiff be paid her salary as a high school teacher from and after September 10, 1971, with interest;
- (6) directing the Board to serve upon the plaintiff all medical reports relating to the plaintiff obtained by the Medical Bureau; and
- (7) directing the respondents to cease and desist from any acts prejudicing the rights of the plaintiff which are contrary to due process and are intended to conspire against plaintiff's contractual, legal and professional rights.

By a decision dated May 17, 1972, and an order signed on July 6, 1972, Justice Heller denied the plaintiff's petition except insofar as the Board's decision of January 18, 1972, which extended the plaintiff's leave of absence for the 1971-1972 school year. With reference to this latter portion of the plaintiff's application, the court remanded the issue

to the Board to supply an adequate record evidencing a reasonable basis for placing the plaintiff in the status of an inactive employee without compensation from November 7, 1971.

The court ordered the Board to conduct another medical examination of the plaintiff and to reconsider its prior determination in light of both the results of the reexamination and the medical reports of independent physicians, which had been submitted by the plaintiff.

Thereafter, plaintiff made application to the Appellate Division of the New York State Supreme Court, Second Department, for leave to appeal Justice Heller's order. This motion was denied.

On October 19, 1972, in compliance with the court's remand order, the Board requested plaintiff to submit to a medical reexamination. Plaintiff, however, refused to submit to another examination. Instead, plaintiff, on April 5, 1973, filed in this court a complaint against the Board, seeking:

- (1) a temporary restraining order, restraining the Board from acting under the color of authority contained in the New York Education Law § 2568 from preventing the plaintiff from pursuing her regular profession as a school teacher for the City of New York;
 - (2) a preliminary and permanent injunction, enjoining

the Board and anyone acting in concert with the Board from preventing the plaintiff -rom pursuing her regular profession;

- (3) a judgment declaring Section 2568 of the New York Education Law unconstitutional, insofar as it authorizes the placing of the plaintiff on an involuntary medical leave of absence without disclosing the medical reports relied upon by the Board, a hearing and due process of law;
- (4) adjudgment directing the Board to reinstate the plaintiff in her teaching position; and
- (5) a judgment awarding plaintiff \$39,500 in monetary damages together with interest from July 1, 1970.

Plaintiff predicates jurisdiction in the federal courts upon Title 42 U.S.C. § 1983 and Title 28 U.S.C. §§ 1331 (a), 1343 and 2201 et seq.

The doctrine of res judicata is based upon a theory of judicial economy and convenience, permitting a court to dispense with the relitigation of a cause of action which has already been adjudicated by another court of competent jurisdiction. The full-faith-and-credit clause of the Constitution requires a federal court to accord final state court judgments full res judicata effect. Gart v. Cole, 263 F. 2d 244 (2d Cir.), cert. denied 359 U.S. 978 (1959); Olsen v. Board of Ed. of Union Free School Dist. No. 12 Malverne, New York, 250 F. Supp.

1000 (E.D.N.Y.), appeal dismissed, 376 F. 2d 565 (1966); Cf.

Tayler v. New York Transit Auth., 433 F. 2d 665 (2d Cir. 1970);

Frazier v. East Baton Rouge Parish School Bd., 363 F. 2d 861

(5th Cir. 1966).

The doctrine of res judicata, however, can only be invoked after a valid judgment between the same parties or their privies has adjudicated the matter in controversy with finality; that is to say, only a final judgment is amenable to res judicata treatment. 1B MOORE'S FEDERAL PRACTICE 9.409[1] p. 1001-1002. By contrast, an interlocutory or intermediate court order will not furnish a defense of res judicata to a litigant, unless with respect to some particular matter it makes a final disposition, in which event it would be res judicata as to that matter which is concluded. Id. at 1002, citing, Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co., 71 F. Supp. 111 (N.D.Cal. 1947); RESTATEMENT OF JUDGMENTS, Explanatory Notes § 41, comment c at 118 (1942).

"Because one phase of a litigation was left unsettled and in that sense the judgment is nterlocutory does not preclude the holding that the judgment is res adjudicata as to that phase which has been finally concluded." Tuolumne Gold Dredging Corp.
v. Walter W. Johnson Co., 71 F. Supp. at 113.

Thus, in the case at bar, this Court is not precluded from granting the state court judgment res judicata effect merely

because it was partially interlocutory in nature, if other aspects of the judgment were conclusively resolved by the state court. The interlocutory portion of the state court order involved only the issue of the plaintiff's reinstatement to her teaching post for the 1971 school year. This can be distinguished from the other portion of the state court order which dealt with the property of the Board's initial determination to place the plaintiff on a medical leave of absence during the 1970 school year.

It becomes essential, therefore, to closely scrutinize the prior state court decision to ascertain whether the conclusive portion of the judgment was in fact on the merits and, therefore, final in nature. Plaintiff maintains that Justice Heller's dismissal of her Article 78 proceeding was predicated upon a failure to comply with the four-month statute of limitations and was not, consequently, on the merits. However, a careful examination of the state court's opinion and the subsequent court order indicates no support for such a contention. In the state court's eight page opinion only a single paragraph touched upon the issue of non-compliance with the period of limitations, and then only by way of an aside.

"In any event, he letter dated July 31, 1970 was a determination placing her on inactive status and granting a leave of absence. She exhausted her administrative remedies with respect to that determination on September 28, 1971, the date of the arbitrator's award. The proceeding was commenced on March 2, 1971. There was no compliance with the four-month period of limitations set forth in CPLR 217." (Citations omitted).

It is also clear that the court did explicitly reach the merits of a number of specific issues raised by the plaintiff, to wit:

- (1) that there was a sufficient basis for the report of the principal, Gordon, requesting a medical examination of the plaintiff;
- (2) that the plaintiff did not have the right to a review by an ad hoc committee of physicians;
- (3) that the plaintiff was not entitled to the medical reports of the Board's Medical Bureau; and
- (4) that the plaintiff was not entitled to be accompanied by a physician or other person of her own choice when being examined by the Medical Bureau to determine whether she was fit to be reinstated to her position. $\frac{4}{4}$ At best, it can

^{/4} Moreover, it is arguable that the case at bar falls within the ambit of Taylor v. New York Transit Auth., 433 F. 2d 665 (2d Cir. 1970). In that case a final administrative determination was held to be res judicata in the federal courts even though the state court had dismissed the plaintiff's Article 78 proceeding on the basis of lack of

only be argued that the dismissal of the plaintiff's state court action was founded upon alternative theories, one on the merits and the other based upon an expiration of the statute of limitations.

"Where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment, and a subsequent action based upon the same cause of action is ordinarily barred." RESTATEMENT OF JUDGMENTS, Explanatory Notes § 49, comment c at 196 (1942).

A more intricate and vexatious question arises as to whether the plaintiff proceeds here upon the same "cause of action" as that previously advanced in the prior state court

jurisdiction and/or lapsing of the statute of limitations. Similarly, in the present action plaintiff was granted an opportunity to argue the merits of her claim before a hearing officer and the subsequent dismissal of her appeal to the superintendent was final, unless reversed by the Commissioner of Education.

Thus, it can be said that the administrative decision was final and the Taylor decision applicable:

"While the state courts perceived themselves as powerless . . . to hear Taylor's belated Articlt 78 proceeding claim, it was only because the due process claim was not raised in the first instance before the Commission that they could not do so. Had appellant prosecuted his constitutional objection in a timely manner, and had the Commission made an unsatisfactory disposition thereof, the courts of New York in the exercise of their responsibility under the Supremacy Clause of the United States Constitution to entertain Federal constitutional questions, no doubt would have taken jurisdiction of appellant's case." Id. at 668. (Citations omitted).

^{/4} Cont'd

proceeding. The task is exacerbated by the fact that both courts and legal scholars have been unable to formulate a single immutable definition of the term "cause of action."

As Mr. Justice Cardozo stated, and it is still applicable:

"A 'cause of action' may mean one thing for one purpose and something different for another . . . This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or the relation to be governed." United States v. Memphis Oil Co., 288 U.S. 62, 67-68 (1933)."

The question of the similarity of "causes of action" becomes more than idle intellectual curiosity in the case at hand, since it has long been held that where the two actions are predicated upon the same "causes of action" a judgment in one suit is conclusive and bars the relitigation of matters actually litigated as well as other matters which might have been litigated. Cromwell v. County of Sac., 94 U.S. 351 (1877); Kalbelka v. City of New York, 353 F. Supp. 7 (S.D.N.Y. 1973). A number of tests have evolved to determine what actually constitutes the same "cause of action." One test emphasizes a technical "rights" approach, that is, if the factual pattern shows one "primary right" of the plaintiff and one wrong done by the defendant which involves that right, the plaintiff is said to possess but a single "cause of action." The rationale

for this approach is based upon a theory that there can only be one recovery for an injury caused by a single wrong. Baltimore S.C. Co. v. Phillips, 274 U.S. 316 (1869); RE-STATEMENT OF JUDGMENTS § 61 at 240 (1942). Another approach rests upon a comparison of the aggregate operative facts. This view, often termed the factual pragmatic approach, finds increasing support in courts today because of the liberalization of the rules regulating joinder, counterclaims and amendment. Still yet, another approach has found an identity of "causes of action" to exist where the subject matter and the ultimate issues in both the old and new proceedings are the See Res Judicata, 38 YALE L. J. 299, 313-314. More same. recently, the necessary measure of identity has been held to exist when a different judgment in the second action would destroy or impair rights or interests established by the first judgment. Moreno v. Marbil Productions, Inc., 296 F. 2d 543, 545 (2d Cir. 1961).

Plaintiff would lead this court to believe that since the relief requested in this case is dissimilar from that sought in the previous suit, the "causes of action" are different and the doctrine of res judicata is inapplicable. Siffice it to say that such an approach, though it possesses a simplistic and economical quality, is not dispositive and

is insufficient in this context. Moreover, this court, in stripping away the facade of dissimilarity in legal verbiage, finds relief sought in both actions to be essentially the same, i.e., reinstatement of plaintiff's teaching duties, nullification of the Board's determinations to place plaintiff on a medical leave of absence, the right to examine the Medical Bureau's reports, and compensation for the loss of wages or for the loss of cumulative absence reserve days. "The additional prayer for declaratory and injunctive relief cannot salvage an otherwise defective complaint and confer jurisdiction where none exists." Tang v. Appellate Division of the N. Y.

Supreme Ct., First Dept., 487 F. 2d 128, fn. 6 at 142.

It becomes apparent that the present action is entirely based upon the same set of facts and subject matter which gave rise to the former state court proceeding and that the plaintiff is attempting here to recover upon the same alleged "primary wrong," which served as a foundation for the first action. Similarly, this court believes that a judgment in favor of the plaintiff would substantially destroy or impair the rights and interests established by the state court judgment. Thus, reducing plaintiff's claims to the most basic elements, this court finds both actions to be predicated upon the identical "cause of action."

cases, it lies only in the "theory of the action" upon which the plaintiff presents her claims. The present suit, unlike the former, is couched in terms of a Civil Rights action under Title 42 U.S.C. § 1983. It has long been held, however, that the recasting of an issue in the form of a Civil Rights action will not provide a litigant with a vehicle to circumvent the res judicata effect of a prior state court judgment.

See, e.g., Tang v. Appellate Division of the N.Y. Supreme Ct., First Dept., 487 F. 2d at 142; Bricker v. Crane, 468 F. 2d 1228 (1st Cir. 1972), cert denied, 410 U.S. 930 (1973);

Johnson v. Dep't of Water & Power of Los Angeles, 450 F. 2d 294 (9th Cir.), cert denied, 403 U.S. 1072 (1971); Murray v. Oswald, 333 F. Supp. 490 (S.D.N.Y. 1971).

Similarly, it would appear that plaintiff presents a new theory of action by challenging the constitutionality of Section 2568 of the New York Education Law. Although it may be conceded that the plaintiff did not directly attack the section's validity, she did not raise the issue of due process violations in both her state court petition 5 and in her request

^{/5} In Paragraph 34 of plaintiff's petition filed with the New York State Supreme Court, Kings County, she alleged that:

"Petitioner's forced medical leave of absence has been accomplished in violation of petitioner's due process and equal protection rights which entitle her to a due process hearing on charges as a prerequisite to suspension. Education Law § 2572(5)."

for relief. The mere fact that the state court was silent as to the constitutional issue presented is immaterial. Tang v. Appellate Division of the N. Y. Supreme Ct., First Dept., 487 F. 2d 138, 141 (2d Cir. 1973); citing, Grupb v. Public Util. Comm'n, 231 U.S. 470, 477-478 (1930).

Even if this court were to construe plaintiff's allegations in the former action as not being a constitutional challenge of the Board's procedures, it does not necessarily follow that the plaintiff can pose the issue for the first time in this court and thereby relitigate her cause of action. As previously noted, the doctrine of res judicata bars the relitigation of issued actually presented as well as those which could have been presented in the first action. Plaintiff is not entitled to advance her claims in a piecemeal fashion. More specifically, it has been held that the failure to raise constitutional questions in the state courts may not be used to preserve a plaintiff's right to enter a federal court at a later time upon the same facts, alleging the same wrong and seeking the same recovery, simply because he presents a new

acts prejudicing the rights of the plaintiff which are contrary to due process and are intended to conspire against plaintiff's contractual, legal and professional rights."

^{/6} Plaintiff had specifically requested an order of the state court:
"directing the respondents to cease and desist from any

theory based on constitutional deprivation. E.g., Resolute

Ins. Co. v. State of North Carolina, 275 F. Supp. 660 (
1967), aff'd, 397 F. 2d 586 (4th Cir. 1968), cert denied,
393 U.S. 973 (1968); Robbins v. Police Pension Fund, 321, F.

Supp. 93 (S.D.N.Y. 1970). Under New York law such a constitutional objection might have been raised and adjudicated in the plaintiff's Article 78 proceeding. Matter of Struppoli v.

Bickal, 21 App. Div. 2d 365, 250 N.Y.S. 2d 969 (4th Dep't 1964);
aff'd, 16 N.Y. 2d 652, 261 N.Y.S. 2d 84, 209 N.E. 2d 123 (1965).

See Taylor v. New York City Transit Aut., 433 F. 2d 665 2d

Cir. 1970).

In Frazier v. East Baton Rouge Parish School Bd., supra, a teacher in the state public school system had been dismissed by the school board and the Louisiana state courts subsequently upheld the board's determination. The teacher then brought suit under the Civil Rights Act alleging for the first time a constitutional claim of discrimination. The Fifth Circuit Court of Appeals in affirming the district court's dismissal of the action, concluded that:

"If state administrative action is first challenged in the state court, and the state court acts judicially, the state decision is res judicata and bars a decision by a federal court. Under the doctrine of res judicata, where the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action. Therefore, the decision of the state court of appeals acting judicially, is a bar to Frazier's

claim in the federal district court even though he raises his federal claim of determination for the first time in the Federal court. In these circumstances, once Frazier submitted his challenge to state administrative action to state judicial review, the only appropriate federal forum for review of his alleged federal claim of discrimination was the United States Supreme Court." 365 F. 2d at 862. (Citations omitted)

See also Howe v. Brouse, 422 F. 2d 347 (8th Cir. 1970);

Adamczyk v. Margis, 359 F. Supp 423 (E.D. Wic. 1973); Morov v.

Independent School Dist. No. 492, 312 F. Supp. 1257 (D.

Minn. 1969), aff'd, 429 F 2d 861 (8th Cir. 1970). This

court rejects plaintiff's contention t at the state court

failed to act "judicially" by never reaching the constitutional issue involved, since the state courts in Frazier

similarly never reached the pertinent constitutional question and yet they were deemed to have acted "judicially."

See Also Tang v. Appellate Division of the N. Y. Supreme

Ct., First Dept., 497 F. 2d at 141.

Plaintiff cites Steward v. Pearce, 484 F. 2d 1031, 1033 (5th Cir. 1973), for the proposition that the Civil Act is "... supplementary to the state remedy and the latter need not be sought and refused before the federal one is invoked." This statement, although true, is inapposite to the facts presented herein. This statement was made by the court in distinguishing between actions under the Civil Rights Act and other proceedings where exhaustion of state

remedies is required. Stewart v. Pearce dealt with an injunctive action to reinstate an English instructor, after the dean of the college had transferred him to a different position following the plaintiff's refusal to undergo a psychiatric examination. The court found that the instructor's procedural due process rights were violated and the transfer was invalid for failure to give the instructor reasons for the examination, notice of a hearing and a proper hearing. Admittedly, the factual patterns are similar, but one essential aspect of this action differs from that presented in the Stewart case, namely, that the latter did not deal with a prior state court judgment or with the issue of res judicata.

Ordinarily the intermediate aspect of the state court's judgment, i.e., the remanding to the Board for reconsideration of its determination of January 13, 1972 placing the plaintiff on a forced leave of absence from September 10, 1971 through June 30, 1972, would not be accorded res judicata effect and this court would stay the present action pending compliance with the provisions of the remand order. See Simons v. Wetherell, 472 F. 2d 589 (2d Cir. 1973). However, in the present context a stay of proceedings would prove to be only an empty gesture. For all intents and purposes the state court action has been

concluded. and nothing remains to be litigated therein. Defendant has to the best of its ability fulfilled the conditions of the court's remand order by requesting plaintiff to submit to a medical reexamination. It is only the plaintiff's refusal to submit to another esamination which has forestalled total compliance with the order and created this hiatus in the state court proceeding. This court is of the belief that a stay of the present action would be inappropriate since the state court has adjudicated all the pertinent legal questions presented by the case at bar. Any question still unresolved by the state court or which deals exclusively with the plaintiff's alleged right to reinstatement for the 1971 school year, rather than the procedures used by the Board in initially placing the plaintiff on a medical leave of absence in 1970. Section 2568 related solely to the Board's initial determination and a constitutional challenge to the section involves an attack upon the conclusive portion of the state court order and not the interlocutory aspect.

^{/7} Even plaintiff admits that:

[&]quot;If a state proceeding is pending it is because the defendant has not taken any steps to enter the required order to terminate the same. The plaintiff surely does not at this time stand as a litigant in the state court." (Plaintiff's Memorandum of Law p. 7). (Emphasis added).

Plaintiff maintains that "the defendant may not force [her] to pursue her state remedies, thus choosing for her the forum in which she seeks to redress the injury she has suffered." (Plaintiff's Memorandum of Law p. 6). But plaintiff has already made a conscious choice of forums by initiating her action in the state courts, which are equally empowered to pass upon issues of constitutionality. Plaintiff has had her day in court and her defeat in the prior action cannot be sidestepped by a collateral attack in this court or by forum shopping. Plaintiff's attempt to proceed here upon the same "cause of action," which was fully presented in the Board's administrative hearing, the arbitration hearing and the Article 78 proceeding, cannot be sanctioned. This court will not permit the plaintiff to take an additional bite of the cherry under the guise of different legal verbiage. Having lost in the state courts, plaintiff's available remedy was to seek review by the

^{/8} Plaintiff was not dragged into the state courts, she freely selected to adjudicate her claims in that forum, rather than initially bringing a Civil Rights action in this court. Tang v. Appellate Division of the N.Y. Supreme Ct., First Dept., 487 F. 2d at 141-143.

[&]quot;State courts are generally capable of giving full and fair consideration to federal constitutional claims....
The fact that a federal constitutional issue is involved in the suit is not a reason to deny full faith and credit to the state court proceedings. This is so even when the federal claim is not presented to or decided by the state court...." Porter v. Nossen, 360 F. Supp. 527, 528-529 (M.D. Pa. 1973). (Footnotes omitted); see NAACP v. B 371 U.S. 415, 427-428 (1963).

/10

United States Supreme Court. Plaintiff's commencement of the present action is merely a form of forum shopping, which the doctrine of res judicata was designed to eliminate.

Moreover, as the court stated in Tayler v. New York City

Transit Auth., supra:

[W]e do not perceive a compelling federal interest to be vindicated which would necessitate overriding clearly strong New York State interests with regard to the finality of state agency decisions and the regulation of state employee behavior, withint judicially supervised constitutional limits, of course. To allow collateral attacks on these interests in a federal forum would be to deliver unnecessary and potentially debilitating blows to legitimate areas of state responsibility." Tayler v. New York City Transit Auth., 433 F. 2d at 671.

In light of the goregoing, this court need not reach defendant's other stated grounds for requesting a dismissal of the complaint.

Accordingly, it is

ORDERED, that the defendant's motion for summary judgment dismissing plaintiff's complaint be and the same is hereby granted on the ground of <u>res judicata</u>.

S/ Anthony J. Travia

^{/10 28} U.S.C. 1257(2); see Tang v. Appellate Division of the N.Y. Supreme Ct., First Dept., 487 F. 2d 138, 141-142 (2d Cir. 1973); citing, Anderson v. Lecon Properties, Inc., 457 F. 2d 929 (8th Cir.), cert denied, 409 U.S. 879 (1972).

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

FRANCINE NEWMAN,

Plaintiff.

73 C 473

SUMMONS

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant.

TO THE ABOVE NAMED DEFENDANT : '

You are hereby summoned and required to serve upon

Gene Ann Condon, plaintiff's attorney, whose address is 26

West 11th Street, New York, New York, 10011 an answer to the
complaint which is herewith served upon you, within 20 days after
service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against
you for the relief demanded in the complaint.

s/ Lewis Orgel
Clerk of Court

s/ Marc Milk
Deputy Clerk

Dated: April 5, 1973

Note:-This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

FRANCINE NEWMAN.

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK.

Defendant.

No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I.

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331(a), 1343 and 2201, et seq., this suit being authorized by Title 42, United States Code, Section 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent further deprivation under color of state law, statute, or ordinance, of rights, privileges and immunities secured to plaintiff by the Constitution of the United States, including the right to equal protection and due process of law under the Fourteenth Amendment to the Constitution and under Title 42, United States Code, Section 1983.

THE PARTY PLAINTIFF

2. The plaintiff, Francine Newman, is 49 years old. She is a teacher of health education in the day high schools in the New York City school system, having received her license in September of 1952. She also holds a substitute license to teach helath education in day high schools, as well as a license to teach in adult community centers and in summer playgrounds under the sponsorship of the New York City Board of Education. As more fully set forth below, she received a "satisfactory" rating for each of the years that she taught in the New York City school system from 1952 to 1969, and she has received over 28 commendations with regard to her teaching abilities during her career.

III.

THE PARTY DEFENDANT

3. The Board of Education of the City of New York is the administrative agency and board which directs and supervises the educational system within the City of New York. In connection with its duties, it promulgates rules and regulations whereunder its functions are carried out and these rules and regulations have the force and effect of state law.

INCIDENTS AT ISSUE

- 4. On or about January 26, 1970, the principal of Far Rockaway High School, the school to which the plaintiff was assigned as a regular teacher, sent a letter to Dr. Nathan, Superintendent of Schools, requesting that a medical examination be given to the plaintiff to determine her mental capacity to perform her duties on the basis of a report which he annexed to the request.
- 5. Section 2568 of the Education Law of the State of New York provides as follows:

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

- 6. Prior to the request to the Superintendent of Schools for a medical examination of the plaintiff, she had not exhibited any symptoms of physical or mental disability, but, on the contrary, had a superior health attendance and performance record.
- 7. The plaintiff submitted to examination by two Board of Education physicians on February 13, 1970, and by Dr. Morris Isenberg, a psychiatrist, on February 25, 1970, and Dr. Samuel Prensky, a psychologist, on April 13, 1970.
- 8. On July 10, 1970, Theodore H. Lang, Deputy Superintendent of Schools, wrote to Mr. David Gordon, principal of Far Rockaway High School, and advised him as follows:

I wish to inform you that the School Medical Director submitted a report dated July 7, 1970, which contains the following recommendation:

"Not fit at present for teaching duty."

"Leave of absence for purpose of balth improvement till June 30, 1971."

9. On July 31, 1970, the plaintiff was advised by letter that she had been placed on leave of absence from September 11, 1970 through June 30, 1971, and that she was required to use up her cumulative absence reserve to cover the number of school days involved.

- 10. On September 4, 1970, the plaintiff sought a review of the Medical Director's recommendation by an ad hoc committee of physicians as authorized by the contract between the Board of Education and the United Federation of Teachers. Such review was denied.
- 11. On various occasions from November 8, 1971 to the present time, plaintiff has sought the release of her medical records from the Board of Education, but the release of the same to her or to her physician has been consistently refused.
- 12. On September 15, 1971, plaintiff was again required to submit to examination by Board of Education doctors for determination of her fitness to return to duty.
- Board of Education doctors, Dr. Lazarus and another physician, whose name is unknown to plaintiff, stated that there was no medical support for the order placing the plaintiff on forced leave of absence. Dr. Lazarus noted upon plaintiff's file that he recommended that the plaintiff be reinstated immediately.
- 14. In spite of the foregoing, the defendant, by notice dated November 11, 1971, required that the plaintiff report to a Board of Education psychiatrist, one Dr. Jack Schnee.

- 15. By letter dated January 18, 1972, the defendant extended plaintiff's forced medical leave from September 10, 1971, without compensation.
- 16. By reason of the foregoing, plaintiff sought and obtained psychiatric evaluations from two psychiatrists who are not employees of defendant. Both psychiatrists found the plaintiff fit mentally and emotionally in all respects, including, but not limited to, her capacity to function in her profession.
- and including the New York Court of Appeals, plaintiff has sought the release of her medical records from defendant, a hearing on the issue of her competency to perform her duties in her chosen profession, and the appointment of independent psychiatrists to evaluate her mental and emotional health. She has been unsuccessful in the courts of the State of New York in that said courts have relied upon the statutory authorization contained in Section 2568 of the New York Education Law as authority for defendant's actions.
- 18. The plaintiff at the time she was placed on involuntary medical leave of absence earned a salary of \$ per annum. By reason of her being placed on involuntary leave of absence, she has not received any regular salary or compensation from the defendant since July 1, 1970, all to her damage in the sum of

- 19. Section 2568 of the Education Law of the State of New York deprives plaintiff of rights secured to her by the Constitution of the United States, and more particularly:
 - A. The statute provides for involuntary medical retirement, without pay, on the basis of medical examinations and reports, the contents of which were never made known to plaintiff and to which plaintiff has, under color of the statute and the Rules and Regulations of the Board of Education of the City of New York, no access;
 - B. The statute does not provide for due process of law in that plaintiff has, under color of the same, been denied a hearing with reference to the issue of her competency, the opportunity to confront witnesses against her and the opportunity to present witnesses and other evidence on her own behalf;
 - C. The statute is vague and unconstitutional in that it does not set forth standards or guidelines to determine competency and health;
 - D. The statute, under color of law, and by practice and usage of the defendant, has caused the plaintiff's relationship with the defendant to be terminated against her will and to her damage in the sum of \$; and

E. Plaintiff has been dprived of her property, i.e., accumulated sick leave and salary, without due process of law.

IV.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

- 1. A temporary restraining order restraining the defendants and anyone acting under color of the authority contained in Section 2568 of the Education Law of the State of New York from preventing the plaintiff from pursuing her regular profession, i.e., acting as a licensed school teacher of the City of New York.
- 2. A preliminary and permanent injunction each enjoining the defendant and anyone acting in concert with the defendant from preventing the plaintiff from pursuing her regular profession, i.e., acting as a licensed school teacher of the City of New York.
- 3. A judgment declaring Section 2568 of the Education Law of the State of New York, insofar as it authorizes the placing of the plaintiff on involuntary medical leave without a disclosure of the medical reports relied upon by the defendant, a hearing, and due process of law to be unconstitutional.

- 4. A judgment directing the defendant to reinstate the plaintiff in her regular profession and position.
- 5. A judgment awarding the plaintiff damages in the sum of \$\dagger\$, together with interest thereon from July 1, 1970.
- 6. Such further relief as the Court deems just and proper.

Respectfully submitted,

GENE ANN CONDON 26 West 11th Street New York, New York 10011 (212) 674-6920 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

FRANCINE NEWMAN,

Plaintiff,

73 Civ. 473

Judge Travia

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

ANSWER

Defendant.

Defendant, Board of Education of City of New York, by its attorney, NORMAN REDLICH, Corporation Counsel of the City of New York, for its answer to the complaint herein:

- 1. Deny the allegations contained in paragraphs "1", "6", "13" and "19" thereof.
- 2. Deny the allegations contained in paragraph ".4" thereof except admit that on or about January 26, 1970, the principal of Far Rockaway High School, the school to which plaintiff was assigned as a regular teacher, sent a letter to Dr. Nathan, Superintendent of Schools, requesting that a physical and medical examination be given to plaintiff together with a report giving the reasons for the request.
- 3. In answer to paragraph "5" thereof, the Court is respectfully referred to Section 2568, Education Law (New York) (McKinney's Consolidated Laws of New York Annotated, vol. 16, sections 2101 to 5500 (1970 ed.).

- 4. Deny the allegations contained in paragraph "9" thereof, except admit that on July 31, 1970, plaintiff was advised by letter that her absence had been approved from September 11, 1970 through June 30, 1971, and that according to the defendant's records, plaintiff's cumulative absence was sufficient to cover the number of school days involved.
- 5. Deny the allegations contained in paragraph "11" thereof, except admit that on various occasions the plaintiff has sought to be served with all of the medical records, exclusively the property of defendant, and concerning her medical situation.
- 6. Deny the allegations contained in paragraph. "12" thereof, except admit that plaintiff was scheduled by defendant for a medical and physical examination, all at the request of plaintiff.
- 7. Deny the allegations contained in paragraph "14" thereof, except admit that on or about November 11, 1971 defendant requested that plaintiff report to the office of Dr. Jack Schnee, panel psychiatrist.
- 8. Deny the allegations contained in paragraph "15" thereof, except admit that, by letter, defendant informed plaintiff that her absence had been approved from September 10, 1971 through June 30, 1972, and that as of October 7, 1971 said absence would be without pay.

- 9. Deny the allegations contained in paragraph "17" thereof, except admit that, in State Court proceedings, instituted March 2, 1972, the plaintiff has sought an order:
 - 1. Commanding and directing the respondent Board of Education of the City School District of New York to restore the petitioner to active teaching duties.
 - 2. Commanding and directing the respondent Board of Education of the City School District of New York to rescind, cancel and withdraw the order of July 31, 1970 heretofore issued placing the petitioner on forced leave of absence from September 11, 1970 through June 30, 1971.
 - 3. Commanding and directing the respondent Board of Education of the City School District of New York, to rescind, cancel and withdraw the order of January 18, 1972 heretofore issued placing the petitioner on ofrced leave of absence from September 10, 1971 through June 30, 1972.
 - 4. Commanding and adjudging that petitioner's accumulated sick leave days be restored to her for the period of her forced leave of absence between September 11, 1970 and June 30, 1971, and that the sums paid to her be credited against the salary due her instead of against sick leave.
 - 5. Commanding and adjudging that petitioner be paid her salary as a high school teacher in respondent Board of Education of the City School District of New York's employ from and after September 10, 1971 with interest on each monthly installment thereof from the date of accrual to the date of payment.
 - 6. Commanding and directing the respondent Board of Education of the City School District of New York to serve with the answer to this petition all medical reports pertaining to the petitioner obtained by its Medical Bureau subsequent to the recommendation by her Principal, David Gordon, that she be given a medical examination.

7. Commanding and directing the respondents herein to cease and desist from any and all acts prejudicing the rights of petitioner insofar as such acts are contrary to due process, are intended to and do conspire against her contractual, legal and professional rights, and constitute severe and relentless harassment of petitioner.

8. Directing a jury trial if necessary to a favorable determination of the proceeding.

9. Granting the petitioner such other and further relief as the Court may deem just and proper in the premises.

That Mr. Justice Louis B. Heller of the Supreme
Court of the State of New York, Kings County Ordered on July
6, 1972:

ORDERED and ADJUDGED that the petitioner's application to annul the determination of July 31, 1970 placing the petitioner on forced leave of absence from September 11, 1970 to June 30, 1971 be and hereby is denied without costs, and it is further

ORDERED that petitioner's application to restore petitioner's cumulative sick leave reserve for the period from September 11, 1970 to June 30, 1971, be and hereby is denied; and it is further

ORDERED that petitioner's application to direct the respondent Board of Education to furnish all medical reports of its Medical Bureau subsequent to the recommendation by her principal, the respondent, DAVID GORDON, that she be given a medical examination, by and hereby is denied; and it is further

ORDERED that the petitioner is not entitled to be accompanied by a physician or other person of her own choice when examined by the Medical Bureau of the Board of Education; and it is further ORDERED that the part of the proceeding dealing with the determination of January 18, 1972, placing petitioner on forced leave of absence from September 10, 1971 to June 30, 1972, without pay from November 7, 1971, is remanded to the respondent Board of Education of the City School District of New York to consider the medical reports of petitioner's physicians and the reexamination of the petitioner if conducted as the basis for a new recommendation by the Board's Medical Director concerning the restoration of the petitioner to active teaching duties.

That the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on July 31, 1972 denied the instant plaintiff's motion for leave to appeal; that on September 28, 1972, the Court of Appeals for the State of New York dismissed the instant plaintiff's motions for leave to appeal and for a stay of Mr. Justice Heller's order; and, that the state court proceeding is still pending.

- 10. Deny the allegations contained in paragraph "18" thereof which state that plaintiff has suffered any damages by reason of defendant's actions.
- 11. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph "2" thereof which set torth plaintift's age and exact number of "commendations" received by plaintift.

12. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph "16" thereof.

AS AND FOR A FIRST DEFENSE,
DEFENDANT RESPECTFULLY ALLEGES:

13. This action should be dismissed for reason of the doctrine of res judicata, in that plaintiff has fully litigated the issues raised herein in a prior state court proceeding, to wit: In the Matter of, etc., Francine Newman, etc., v. David Gordon, etc., et al (Sup. Ct., Sp. T., Kings Co., Heller, J., May 17, 1972, docket No. 3727/12); mot. for leave to app. den., - A.D. 2a - (2nd Dept., July 31, 1972); mot. for leave to app. den., - NY 2d - (Sept., 28, 1972); or could have raised said issues, and is therefore barred from instituting this action in the District Court.

AS AND FOR A SECOND DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

14. This action should be dismissed pursuant to Rule 12 (b)(6), F.R.C.P., for reason of failure to state a cause of action, in that plaintiff has failed to set forth a substantial federal question.

AS AND FOR A THIRD DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

15. This action should be dismissed pursuant to Rule 12 (b)(1), F.R.C.P. for reason that this Court lacks jurisdiction over the subject matter of the complaint herein.

AS AND FOR A FOURTH DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

16. This action should be dismissed for reason of the doctrine of waiver and estoppel for reason that plaintiff may not seek relief greater than that provided by a freely entered into, valid, collective bargaining agreement, to wit: "Agreement between The Board of Education of the City of New York and United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, covering Day School Classroom Teachers and Per Session Teachers, September 8, 1969 - September 8, 1972, Article IV (F)(21).

AS AND FOR A FIFTH DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

17. This action should be dismissed for reason of the doctrine of laches.

AS AND FOR A SIXTH DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

- of pendency of the prior state court proceeding, above mentioned, between the same parties, and concerning the same issues and facts as herein. Said proceeding is still pending for reason that plaintiff has refused to do an act constituting a condition precedent to the performance of the remand ordered by Mr. Justice Heller.
- (b) In the alternative, further proceedings in this action should be stayed pending the state court proceeding for the above mentioned reasons.

AS AND FOR A SEVENTH DEFENSE, DEFENDANT RESPECTFULLY ALLEGES:

19. Plaintiff's demand, contained in her complaint, for a judgment declaring §2568, Education Law (New York) unconstitutional should be dismissed for reason that she has not so moved in an appropriate manner pursuant to §52201, 2281, Title 28, U.S.C.

WHEREFORE, defendant Board of Education of The City of New York pray that the complaint herein be dismissed in all respects, and for such other and different relief as to this Court may appear just and proper.

Dated: New York, New York

June 18, 1973

NORMAN REDLICH
Corporation Counsel
Attorney for Defendant
Municipal Building
New York, New York 10007
212/566-2192

Assistant Corporation Counsel

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

FRANCINE NEWMAN.

Plaintiff,

-against-

NOTICE OF MOTION : FOR SUMMARY JUDGMENT

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

73 Civ. 473 A.J.T.

Defendant.

Motion By:

Defendants

Date, Time and Place of Motion:

December 7, 1973 at 10:00 AM in the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York before the Honorable Anthony J. Travia, District Judge in Room nine of said Courthouse

Relief demanded:

An Order pursuant to Rule 56 of the Rules of Civil Procedure granting defendant summary judgment dismissing the complaint with costs on the grounds of res judicata and failure to state a claim upon which relief can be granted or in the alternative to stay further proceedings on the ground that a state court proceeding is pending.

Supporting papers:

Affidavit of H. Kenneth Wolfe sworn to November 27, 1973 and exhibits annexed thereto as well as prior papers and proceedings had herein.

Dated: November 27, 1973

New York, New York

Respectfully submitted,

TO: Clerk of the Court

Gene Ann- Condon, Esq. Attorney for Plaintiff

NORMAN REDLICH Corporation Counsel

Attorney for Defendant

566-0957-

FRANCINE NEWMAN.

Plaintiff,

73 Civ. 473

-against-

Judge Travia

-against-

AFFIDAVIT

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

- H. KENNETH WOLFE, being duly sworn, deposes and says:
- 1. I am an assistant in the office of NORMAN REDLICH, Corporation Counsel, attorney for defendant herein, and am fully familiar with the facts stated herein.
 - 2. I make this affidavit in support of defendant's motion for summary judgment and in the alternative to stay further proceedings in this action pending a final determination of the state court proceeding.
 - 3. Plaintiff served as a teacher of health education from 1952 until 1969 (complaint para 2). On or about January 26, 1970 David Gordon, then principal of Far Rockaway High School, wherein plaintiff was assigned as a regular teacher, requested that the Superintendent of Schools give plaintiff a medical examination (complaint para. 4; Exhibit I, para. 27 [verified answer of Board of Education in Matter of Newman v. Gordon and Bd. Educ. Index No. 3727, Supreme Court of State of New York, County of Kings]).

- 4. Pursuant to \$2568, Education Law (New York) and at the direction of the Superintendent of Schools, the medical director of defendant Board of Education requested plaintiff to appear for medical examination (Exhibit I, para. 29). A copy of \$2568, Education Law is annexed as Exhibit II.
- 5. On or about February 13, 1970, February 25, 1970 and April 13, 1970 plaintiff was examined by two physicians, a psychiatrist and a psychologist respectively (complaint, para. 7).
- 6. On or about July 7, 1970 the Medical Director reviewed plaintiff's medical reports resulting from her examinations and concluded in a memorandum to Deputy Superintendent Theodore H. Lang that plaintiff was not then presently fit for teaching duties (Exhibit I, paras. 33, 34).
- advised by Deputy Superintendent Lang that she had been placed on leave of absence from September 11, 1970 until June 30, 1971 and that her cumulative absence reserve was sufficient. to cover the number of school days involved (complaint, para. 9; Exhibit I, para. 35). Said determination was challenged by plaintiff in state court proceeding (petition, para. 18). A copy of the order to show cause and the petition is annexed as Exhibit III. Subsequently, plaintiff's application to annul said determination was denied by JUSTICE HELLER in his Order of July 6, 1972. A copy of which is annexed as Exhibit IV.

- 8. On or about September 4, 1970 plaintiff sought review of the Medical Director's finding by an ad hoc Committee of Physicians. Defendant denied the request for review. As a result of administrative proceedings culminated by binding arbitration agreed to by defendant and the United Federation of Teachers (complaint, para. 10; Exhibit I, paras. 51-55), plaintiff's request for review was again denied because her forced leave of absence did not result in any of the conditions precedent required by Article IV-F-21, Agreement between defendant and United Federation of Teachers, Local 2, American Federation of Teachers covering Day School Classroom Teachers and Per Session Teachers, Sept. 8, 1969-Sept. 8, 1972.
- 9. Pursuant to plaintiff's request on December 1, 1970, the Medical Division's report was sent to Dr. Valicente, plaintiff's physician (Exhibit I, paras. 44, 45).
- 10. On or about September 18, 1971 plaintiff was again requested to submit to be examined by defendant's doctor's in order to ascertain whether her health was such to permit her to return to duty (complaint, para. 12; Exhibit I, para. 58).
- 11. On or about October 18, 1971 and November 18, 1971 plaintiff was examined by various doctors and a psychiatrist (Exhibit I, paras. 61, 62).
- 12. Based on the examinations, said doctors recommended to the Medical Director that plaintiff was not fit to return to her duties (Exhibit I, para. 62).

- Division of Personnel notified plaintiff on or about January 18, 1972 that she had been placed on leave of absence from September 10, 1971 through June 30, 1972; said leave was without pay after October 7, 1971 because her cumulative absence reserve had expired on said date (complaint, para. 15, Exhibit I, para. 63).
- 14. Said determination was also challenged in aforesaid state court proceeding (Exhibit III, para. 28), and JUSTICE HELLER remanded the determination which placed plaintiff on a forced leave of absence; however, the application to restore plaintiff's cumulative sick leave reserve was denied (Exhibit IV).
- 15. On March 2, 1972, plaintiff instituted a proceeding pursuant to Article 78, Civil Practice Law and Rules (New York) entitled In the Matter of the Application of Francine Newman v. David Gordon and the Board of Education of the City School District of New York, Index No. 3727/1972 in the Supreme Court of the State of New York, County of Kings by personal service of an order to show cause.
- 16. In said proceeding, plaintiff sought an Order:

 (1) directing defendant to restore plaintiff to active
 teaching duties; (2) directing defendant to cancel the order
 of July 31, 1970 placing plaintiff on forced leave of
 absence; (3) directing defendant to cancel order of January
 18, 1972 placing plaintiff again of forced leave of absence;
 (4) restoring plaintiff's sick leave; (5) directing defendant
 to pay plaintiff her salary after September 10, 1971;

- (6) directing defendant to provide plaintiff with all medical reports pertinent to this proceeding; (7) directing defendant to cease all acts prejudicing the rights of plaintiff which are contrary to due process.
- 17. Additionally, plaintiff alleged that her forced medical leave of absence was accomplished in violation of her rights of equal protection and due process (Exhibit III, para. 34).
- answer and plaintiff's reply, JUSTICE HELLER signed an intermediate Order on July 6, 1972 in said proceeding.

 Copies of the answer and reply are annexed hereto as Exhibit I and V respectively. The intermediate Order denied plaintiff's application for all reliefs sought except that the part of the application concerning defendant's determination of January 18, 1972 placing plaintiff on a forced leave of absence from September 10, 1971 until June 30, 1972 was remanded to defendant for further consideration; said consideration to be based in part on a reexamination of plaintiff (Exhibit IV).
- 19. Plaintiff moved the Appellate Division of the State Supreme Court, Second Department for leave to appeal the intermediate Order of JUSTICE HELLER.
- 20. On July 31, 1972, the Second Department made an Order denying plaintiff's motion. A copy of the Appellate Division Order is annexed hereto as Exhibit VI.

- 21. Subsequently, plaintiff moved the State Court of Appeals for an Order granting a "stay pending the hearing and determination of a motion for leave to appeal and if such motion be granted for a stay pending the determination of the appeal, staying the provisions of the order of Special Term" (i.e. JUSTICE HELLER'S Order).
- 22. On September 28, 1972, the Court of Appeals dismissed plaintiff's motion and her request for a stay 31 N.Y. 2d 676, 709.
- 23. Plaintiff did not choose to make application for certiorari to the United States Supreme Court. Accordingly, the intermediate Order of JUSTICE HELLER became effective in all respects including that portion directing a remand.
- 24. By letter dated October 20, 1972, defendant requested that plaintiff report for reexamination in order that the parties comply with the Order of Special Term directing a remand. A copy of the request is annexed hereto as Exhibit VII.
- 25. By letter dated October 24, 1972, the attorney, who represented plaintiff in the state court proceedings, notified defendant that plaintiff would not submit to reexamination. A copy of the refusal is annexed hereto as Exhibit VIII. However, the reason given for said refusal had no basis in that the stay issued by JUDGE BURKE was dismissed on September 28, 1972. Matter of Newman v. Gordon et al. 31 NY 2d 709.

WHEREFORE, your deponent respectfully requests? the motion for summary judgment be granted dismissing the complaint on the grounds of res judicata and failure to state a claim upon which relief can be granted and in the alternative that the action be stayed.

H. Kenneth Wolfe
H. KENNETH WOLFE

Sworn to before me this 30th day of November, 1973

GAYLE S. SANDERS
Notary Public. State G. New York
No. 31-5441103
Qualified in New York County
Commission Expires 1830, 19795

Kayle D. Danders

In the Matter of the Application

of

FRANCINE NEWMAN,

ANSWER

Index No.

Petitioner,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

DAVID GORDON, PRINCIPAL OF FAR ROCKAWAY HIGH SCHOOL, QUEENS, NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Respondents.

Respondents, by their attorney J. LEE RANKIN, Corporation Counsel, answering the petition herein:

- 1. Deny each and every allegation contained in paragraph "7" of the petition except admit that prior to 1969-1971 chool year, petitioner's services were rated "satisfactory" and that for the 1969-1970 school year petitioner's services were rated "unsatisfactory' on June 30, 1970, by the Principal of Far Rockaway High School, Mr. David Gordon.
- 2. Deny each and every allegation contained in paragraph "8" of the petition.

- 3. Dery each and every allegation contained in paragraph "9" of the petition except admit that by letter dated January 26, 1970, from Mr. David Gordon to Dr. Nathan Brown, Superintendent of Schools, Mr. Gordon requested that a physical and medical examination be given to petitioner and that the basis for this request is contained in a report attached to said letter.
 - 4. Deny each and every allegation contained in paragraph "10" of the petition.
- 5. With respect to the allegations contained in paragraph "ll" of the petition, deny each and every allegation contained in the first paragraph thereof; deny each and every allegation contained in the second paragraph thereof except admit that the incident involving petitioner's failure of approximately 75 students in a class of 90 occurred prior to the 1969-1970 school year and that Exhibit "2" annexed to the petition purports to be a letter from Mr. Robert G. Rommer; deny each and every allegation contained in the third paragraph thereof except admit that petititioner's colleagues sent donations to the Cancer Society in her mother's memory but deny knowledge or information sufficient to form a belief as to the truth of the allegation that petitioner discussed the incident with

- 6. Deny each and every allegation contained in paragraphs "12" and "13" of the petition.
- 7. With respect to the allegations contained in paragraphs "14" and "15" of the petition respondents refer the Court to Education Law §2568 for its full text and legal effect.
- 8. Deny each and every allegation contained in paragraph "16" of the petition except admit that pior to the 1969-1970 school year petitioner received "satisfactory" ratings and that she had accumulated two hundred sick leave days.
- 9. Deny each and every allegation contained in paragraph "17" of the petition except admit that petitioner was required by the Board of Education Medical Director, Dr. Sidney Leibowitz, to submit and did submit to an examination by two physicians of the Board of Education on February 13, 1970, by a psychiatrist, Dr. Morris Isenberg, on February 25, 1970 and a psychologist, Dr. Samuel Prensky, on April 13, 1970.
- 10. Deny each and every allegation contained in paragraph "18" of the petition except admit that because petitioner was found not fit at present for teaching duty a leave of absence for purpose of health improvement was approved for her from September ?1, 1970 through June 30,

1971; that "Exhibit 3" annexed to the petition is a copy of respondent Board's letter of July 10, 1970, signed by Theodore H. Lang, Deputy Superintendent of Schools, addressed to Mr. Gordon, quoting the Medical Director's recommendation, and that "Exhibit 4" annexed to the petition is a copy of respondent Board's letter of July 31, 1970 addressed to petitioner granting her a leave of absence from September 11, 1970 to June 30, 1971.

- 11. Deny each and every allegation contained in paragraph "19" of the petition except admit that petitioner sought review of the Medical Director's recommendation by an ad hoc Committee of physicians and that such review was denied by respondent Board because petitioner had sufficient days in her cumulative absence reserve to cover the medical leave.
- 12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "20" of the petition except admit that "Exhibit 5" annexed to the petition is a copy of a letter on Dr. Valicenti's stationery and that said letter contains the passage quoted in paragraph "20" of the petition.
- 13. Deny each and every allegation contained in paragraph "21" of the petition except admit that petitioner's father, Louis I. Newman, M.D. requested the Board of Education to release copies of petitioner's medical record but that

such request did not contain the proper signed release as required by the Collective Bargaining Agreement.

- 14. Deny each and every allegation contained in paragraph "22" of the petition.
- paragraph "23" of the petition except admit that as part of the respondent Poard's obligation to examine teachers for fitness to return following health leave for serious and significant illness, petitioner was asked by Dr. Leibowitz, Medical Director of respondent Board, by notice dated September 15, 1971, to report for a medical examination, and that a copy of said notice is annexed to the petition as "Exhibit 7."
- 16. Deny each and every allegation contained in paragraph "24" of the petition except admit that petitioner, accompanied by Gladys Roth, was examined on October 18, 1971, by two of respondent Board's physicians, Dr. Lazarus and Dr. Cinque.
- 17. Deny each and every allegation contained in paragraph "25" of the petition except admit that by notice dated November 11, 1971, an appointment was arranged for petitioner with Dr. Jack Schnee, and that said notice is annexed to the petition as "Exhibit 8".
 - 18. Deny knowledge or information sufficient to

form a belief as to the truth of the allegations contained in paragraph "26" of the petition except admit that a letter on Dr. James E. Shea's stationery, addressed to petitioner's attorney, William Goffen, Esq., is annexed as "Exhibit 9" to the petition and that said letter contains the quote as found in paragraph "26" of the petition.

- 19. Deny each and every allegation contained in paragraph "27" of the petition except admit that Dr. Schnee refused to admit petitioner's physician, James E. Shea, M.D., to the examination.
- 20. Deny each and every allegation contained in paragraph "28" of the petition except admit that petitioner's absence has been approved from September 10, 1971 through June 30, 1972; that petitioner's leave is without pay because her cumulative absence reserve expired on October 7, 1971; that a copy of the letter from the Executive Director of Personnel, Frederick H. Williams, is annexed to the petition as "Exhibit 10"; and that "Exhibit 11" is a copy of a letter from Mr. Williams to Howard L. Horwitz, containing the recommendation of the School Medical Director.
- 21. Deny each and every allegation contained in paragraph "29" of the petition.
- 22. Deny each and every allegation contained in paragraph "31" of the petition except admit that petitioner is willing to perform duties as a teacher.

- 23. Deny each and every allegation contained in paragraph "32" of the petition except admit that with respect to medical and health leaves of absence "charges" are not preferred.
- 24. Deny the allegations contained in paragraph "33" of the petition except admit that petitioner retains the status of an employee of the Board of Education, licensed as Teacher, Physical Education-Day High School.
- 25. Deny each and every allegation contained in paragraphs "34" and "35" of the petition.
- 26. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "37" of the petition.

AS AND FOR A STATEMENT OF PERTINENT AND MATERIAL FACTS RESPONDENTS RESPECTFULLY ALLEGE:

27. By letter dated November 26, 1970, David Gordon, Principal of Far Rockaway High School, and petitioner's supervisor, requested of the Superintendent of Schools that a physical and medical examination be given to petitioner. The reasons for Mr. Gordon's request are contained in the report and its exhibits annexed to the request for examination. A copy of said letter of request for examination and the report upon which request is based is annexed hereto as Respondents' "Exhibit A".

- 28. A review of said report indicates that, contrary to petitioner's allegations contained in paragraph "12" of petition, Mr. Gordon's report is specific as to the factual circumstances upon which he predicates his request for a medical and physical examination for petitioner. The accounts described by Mr. Gordon were, as he states in the last paragraph of said report, over-reactions to situations and indicative of a person unable to exercise self-control and reasoned judgment. He further states, by way of conclusion, that petitioner is "rigid, hostile and suspicious." Aside from the numerous well detailed accounts contained in the report this conclusion is also well demonstrated by "Exhibit C" to the report.
- By-Laws of the Board of Education Section 106, and at the direction of the Superintendent of Schools, the Medical Director of respondent Board, Sidney Leibowitz, M.D., requested that petitioner appear for a medical examination. A copy of By-Laws Section 106 is annexed hereto as Respondents' "Exhibit B". In addition said notice advised petitioner of her right to be accompanied by one person of her choice. A copy of said notice is annexed hereto as Respondents' "Exhibit C".

- 30. On February 13, 1970, petitioner appeared for a medical examination at the Board of Education and was examined by two physicians, Dr. Wright and Dr. Wallfield Both physicians recommended that petitioner be examined by a phychiatrist for further evaluation. The recommendations of Drs. Wright and Wallfield were concurred in by the Medical Director.
- 31. On February 25, 1970, petitioner was examined by Morris Isenberg, M.D., a panel psychiatrist, who withheld a final diagnosis pending psychological testing. Therefore, on April 13, 1970, petitioner was examined and tested by Samuel J. Prensky, Ph. D., a psychologist. Dr. Prensky's report was then forwarded to Dr. Isenberg who made his final diagnosis.
- 32. Dr. Wright reviewed the reports of Drs.

 Isenberg and Prensky on June 24, 1970, and recommended that petitioner is "not fit" for teaching duties. On July 2, 1970, Dr. Wallfield also reviewed said reports and also recommended that petitioner is "not fit" for teaching duties
- 33. After reviewing all of petitioner's medical records the Medical Director issued the medical report, dated

July 7, 1970, on petitioner, in a memorandum to Deputy Superintendent Theodore H. Lang. The report concluded that petitioner is "not fit at present for teaching duty" and that a leave of absence be granted until June 30, 1971, for the purpose of health improvement. A copy of the Medical Report is annexed hereto as Respondents' "Exhibit D."

34. As that report indicates, examinations by the Board of Education physicians found petitioner's thought process to be over-productive and her judgment poor. Furthermore, consultation with the panel psychologiest revealed petitioner to be hypomanic and psychometric testing indicated that she is an excitable neurotic woman whose control is poor and found to be explosive and impulsive. This led to the conclusion that her psychoneurosis and passive aggressive personality characterized also by poor judgment and lack of insight, impair petitioner's ability to perform her duties.

35. By letter dated July 31, 1970, petitioner was informed that a leave of absence was approved for her from September 11, 1970 through June 30, 1971 and that her cumulative absence reserve was sufficient to cover the number of school days involved. A copy of said letter is annexed to the petition as "Petitioner's Exhibit 4".

- 36. Said determination was pursuant to powers enumerated in Education Law \$2568 and in conformity with the By-Laws of respondent Board and the Collective Agreement between the United Federal of Teachers and the Board of Education.
- 37. It should be noted that petitioner alleges, in paragraph "20" of the petition, . she consulted with one Dr. Valicenti, a psychiatrist. In his report annexed to the petition as "Exhibit 5", Dr. Valicenti states that petitioner was psychologically tested, apparently at his request, by Emanuel Fisher, Ph. D., a clinical psychologist. It is significant to note that Dr. Fssher's report revealed that "a combination of depression, anxiety and selfinvolvement tends to reduce Miss N's intellectual efficiency." In addition, Dr. Fisher found that petitioner is "committed to a rather hedonistic style of life" and that petitioner is "somewhat narcissistic and hedonistic." The report states that petitioner is "relatively insensitive to others because of naive self-involvement" and that she has "difficulty in being flexible in adjusting her thinking and responses to the shifting nuances of real situations and real relationships. This rigidity together with her characteristic tactlessness adds to the impression of combativeness." A copy of Dr. Fisher's report is annexed hereto as Respondents' "Exhibit E".

- 38. Petitioner alleges, in paragraphs "21" and "22" of petition, that in derrogation of her contractual rights the Board failed to send said medical report to petitioner's physician.
- 39. Article IV section F subd. 21 of the Collective Agreement provides, in relevant part:

"The report of the Medical Division on a teacher who was called for medical examination shall, upon written request of the teacher, be sent to the teacher's physician."

- Agreement indicates a teacher is entitled to have the <u>report</u> of the Medical Division sent to her physician if the request is in writing.
- Roth, a Field Representative, requested the report dated July 7, 1970, which report is annexed hereto as Exhibit "D", see answer, paragraph "33" supra. Annexed to Gladys Roth's request for the Medical Division's report is an unsigned request, purportedly by petitioner, for the same relief.
- 42. Both of these "requests" were rejected by the Medical Div ision as being improper. Miss Newman's request was unsigned, and thus there is no way of verifying that it was Miss Newman who had in fact requested the relief.

 Gladys Roth's request, as well as those of Dr. Newman were

rejected since it must be the teacher herself who makes the request and it is not the contractual right of a Union Representative, father and/or physician. A copy of Gladys Roth's and petitioner's initial request are annexed hereto as "Exhibit F."

- 43. On November 13, 1970, an additional request was received by the Medical Division from Gladys Roth, this time in the form of a telegram. Once again the Union Representative's request was denied for the reasons stated above.
- 44. By signed letter, dated November 19, 1970, petitioner requested that the medical report be sent to her physician, Dr. Albert Valicenti. A copy of this request is annexed hereto as Respondents' "Exhibit G".
- 45. In response to this request the Medical Director forwarded the Medical Division's report to Dr. Valicenti. A copy of this report is annexed hereto as Respondents' "Exhibit H". Therefore, petitioner's contractual right to have a copy of the Medical Report sent to her physician has been fulfilled.
- 46. Petititioner in her Order To Show Cause, paragraph "6", now demands that respondent Board "serve with the answer to this petition all medical reports pertaining to the petitioner obtained by its Medical Bureau

subsequent to the recommendation by her Principal,
David Gordon, that she be given a medical examination."

47. This request for relief is improper in two respects. Petitioner's contractual rights are limited to supplying her <u>physician</u>, not her lawyer or the teacher herself, with the report of the Medical Division

Petitioner's request is thus improper since it is not executed in writing and signed, and it seeks <u>all</u> medical records not merely "the report of the Medical Division".

48. Said records, as distinguished from the report of the Medical Division, are the exclusive property of the Board of Education and are not available to petitioner or her agents.

49. Another allegation raised in the petition, paragraph "19", is that petitioner was capriciously denied her contractual right to a review by an ad hoc Committee of physicians.

50. The Collective Agreement Article IV section F subd. 21 provides in relevant part:

"A regular teacher shall have the right to an independent evaluation by an ad hoc Committee of physicians if the finding of the Medical Division to the Superintendent has resulted in: (1) placement of the teacher on a leave of absence without pay for more than three months, or (2) termination of the teacher's services, or (3) a recommendation for dissbility retirement."

- view committee was denied because for the 1970-1971 school year petitioner had sufficient days in her cumulative absence reserve to cover the medical leave and petitioner was therefore found not to fit into any of the three enumerated categories. It is thus respondent Board's position that the above section is intended to prevent financial hardship without an adequate review of medical findings.
- 5.. Petitioner's request for an ad hoc committee review was reviewed by Deputy Superintendent Lang and denied by letter dated October 27, 1970. A copy of said letter is annexed hereto as Respondents! "Exhibit I".
- 53. Subsequently a conference, at which petitioner and Mr. Vito De Leonardis, of the United Federation of Teachers were present, was held concerning the petitioner's right to an ad hoc review. By letter dated November 25, 1970 petitioner's request was again denied. A copy of said letter is annexed hereto as Respondents' "Exhibit J".
- 54. Subsequently petitioner, joined by the United Federation of Teachers, commenced an appeal to the Chancellor. It was recommended by the Hearing Officer in said appeal that petitioner's claim to an ad hoc Committee was without merit and her appeal denied. A copy of Chancellor Scribner's Order, dated January 20, 1971, and the hearing officer's decision is annexed hereto as Respondents' "Exhibit K".

55. Finally, the United Federation of Leachers, on behalf of petitioner, agreed to submit the matter to arbitration. Annexed as Respondents' "Exhibit L" is a copy of the Arbitrator's Award. Said award denied petitioner's request for the appointment of an ad hoc committee. In all of the afore-mentioned decisions and awards the position enunciated in this answer, was upheld.

56. Petitioner also asserts in paragraphs
"23" through "29" of the petition that the approval of
petitioner's absence from September 10, 1971 through June
30, 1972 was invalid.

57. Section 106 subd. (7a) of the By-Laws of the Respondent Board provides in relevant part:

"If the employee is unable to resume full service, on the expiring date of the leave of absence without pay, the Superintendent of Schools shall continue such status, and such employee immediately apply for and accept a further leave of absence without pay for the current school term. Such status and such leave of absence without pay may be terminated at any time by the Superintendent of Schools upon the recommendation of the Medical Bureau of the Poard of Education."

58. Pursuant to this subdivision of the By-Laws and petitioner's request, a copy of which is annexed hereto as Respondents' "Exhibit M", an examination by the Medical Division was scheduled, for September 15, 1971, to determine if petitioner's health was such as to permit her return to duty as a teacher.

- 59. Upon petitioner's request the examination was rescheduled for October 18, 1971. A copy of petitioner's request and the respondent Board's notice for the rescheduled examination is annexed hereto as Respondents' "Exhibit N."
- Education Law \$2568 since Section 2568 applies only to the initial examination ordered by the Superintendent of Schools and does not apply to subsequent examinations held to determine petitioner's fitness to return to duty after a serious illness. Consequently, petitioner did not have the right to be accompanied by a physician or other person at the examination for fitness to return to duty.
- before Drs. Lazarus and Cinque. At this examination, which was a brief physicial, Drs. Lazarus and Cinque indicated that their initial impression was that petitioner was fit to return. However, the records of said examination also indicated they felt that petitioner should be examined by a panel psychiatrist before a determination is made. Consequently both physicians reserved judgment pending a psychiatric evaluation. In any event, the decision as to whether a teacher is fit to return is to be made by the Director of the Medical Div ision and not staff physicians.

- 62. On November 18, 1971 and November 29, 1971, petitioner was examined by Jack Schnee, M.D., F.A.P.A., a psychiatrist. Based upon Dr. Schnee's record of his examination in which he found petitioner's illness still present, as well as prior records, Drs. Lazarus and Cinques evaluated petitioner's medical history and recommended that she is "not fit" for resumption of duty. This recommendation was concurred in by Dr. Leibowitz, Director of the Medical Division.
- 63. Thereafter petititioner's absence for restoration of health was approved from September 10, 1971 through June 30, 1972 by Frederick H. Williams, Executive Director of the Division of Personnel. A copy of said notice is annexed to the petition as Exhibit 10'. As that notice indicates petitioner 's cumulative absence reserve has expired as of October 7, 1971, and she is not entitled to compensation for the leave of absence. Said determination is in compliance with By-Laws Section 106.

AS AND FOR A FIRST AND COMPLETE DEFENSE RESPONDENTS RESPECTFULLY ALLEGE:

64. Respondents actions have in all respects been reasonable and not in violation of any right petitioner may have pursuant to the Education Law, the By-Laws of the Board of Education or the Collective Agreement between the Respondent Board and the United Federation of Teachers.

65. By reason of the foregoing, petitioner has failed to state facts sufficient to warrant the relief requested herein.

AS AND FOR A SECOND DEFENSE RESPONDENTS RESPECTFULLY ALLEGE:

- 66. Petitioner seeks review of the initial determination placing her on leave of absence. Said determination, annexed to petition as Exhibit "4", is dated July 31, 1970.
- 67. CPLR §217 provides in relevant part that, unless a short r time is provided.

"a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.

- 68. The instant proceeding was initiated by serving respondent Board on or about March 2, 1972.
- 69. More than four months having elapsed, the petition is barred with respect to petitioner's first leave of absence.

AS AND FOR A THIRD DEFENSE RESPONDENTS RESPECTFULLY ALLEGE:

70. Petitioner alleges she was entitled to an ad hoc review by a committee of physicians of the initial determination granting her a leave of absence.

71. Said issue has been the subject of arbitration between the parties to the instant proceeding and an arbitrator's award granted in favor of respondents. See "Exhibit L" annexed to the answer, supra.

72. By reason of the foregoing, the instant cause of action may not be maintained.

WHEREFORE, respondents respectfully urge that the petition be denied as the proceeding dismissed.

J. LEE RANKIN
Corporation Counsel
Attorney fo: Respondents
Office & P.O. Address:
Municipal Building
Borough of Manhattan
New York, New York 10007
Tel.: 566-6377

VERIFICATION OF ANSWER BY SECRETARY OF

County of Kings, being duly sworn, says that he has been duly designated as Secretary of the Board of Education of The City of New York, and as such that he is an officer of the same. That the foregoing answer is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by defendant is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the said Board of Education and from statements made to him by certain officers or agents of the said Board.

Sworn to before me, this

State of New York,

day of ...

Notary Public, State of Hew York No. 24-9198523

Qualified-In Kings Co Commission Expires March

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BOARD OF EDUCATION, CITY OF NEW YORK

FAR ROCKAWAY HIGH SCHOOL

BEACH TWENTY-FIFTH STREET AND OCEAN CREST BOULEVARD
FAR ROCKAWAY, N.Y. 11691

DAVID GORDON, PRINCIPAL

FAR ROCKAWAY 7-6000

January 26, 1970

Dr. Nathan Brown Superintendent of Schools 110 Livingston Street Brocklyn, New York 11201 DEFENDANT'S EXHIBIT II ON MOTION FOR SUMMARY JUDGMENT

ATTENTION: Dr. Theodore Lang

Dear Sir:

After consultation with my assistant superintendent, and in accordance with the Bylaws of the Board of Education, I request that a physical and medical examination be given to Miss Francine Newman, a teacher assigned to Far Rockaway High School.

Attached herewith is a report giving the reasons for my request for this examination.

I have sent a copy of this letter, as well as a copy of the report to Miss Newman.

Very truly yours,

David Gentin

David Gordon Principal

DG:JF CC: Mrs. Kole

2 copies of report attached

Miss Francine Newman 108-48 70th Road Forest Hills, New York

Miss Newman

FAR ROCKAWAY HIGH SCHOOL FAR ROCKAWAY, N.Y.

The following are the reasons for my request for a physical and medical examination of Miss Francine Newman.

It is my opinion that Miss Francine Newman, a teacher of Health Education at this school, requires help and at least termporary relief from her duties. She is embittered, hostile, and alienated from most of her colleagues. Her judgments in professional areas are unusual and inappropriate. Her handling of pupils has resulted in an inordinate number of complaints and nasty pupil reactions. I cite specific illustrations.

In the handling of her classes, she is unreasonable and arbitrary in some of her demands, but cannot be persuaded of her error through reasoned discussion. Several times she charged students with having forged medical notes without first investigating, berated them violently, and referred them for disciplinary action. The medical notes proved to be authentic. Upon being apprised of this, her response was "Well, it looked like a child's handwriting." On one occasion, she gave a "U" in citizenship to approximately 75 students in a class of 90, and defended her action by saying "I warned them I would do so if they misbehaved." When the principal and Mr. Rommer, then her chairman, held a conference with her to discuss the mass "U" incident, she angrily stormed out of the office saying, "Give me a "U"."

Except for minimum communication required professionally, she speaks to no one in her department, and coldly and strongly rejects any friendly overtures. At the time of her mother's death, recently, she publicly characterized as "hypocritical" the faculty members who sent condolence cards. When she learned that members of her department had sent a contribution in her mother's name to the Cancer Society, she telephoned their headquarters and demanded that the money be returned to the donors, saying that she would replace the sum with a personal contribution.

She assigns assisting teachers in physical education classes to duties easily handled by a student aide and screams at them and at the pupils when they incur her displeasure. Mr. Rommer, at a meeting with her and others, tried to tell her that this was why her assistants were hesitant to approach her. In rapid succession she rejected his statement, then admitted to screaming, and finally condoned it by saying "She gets over it soon."

She rejects every suggestion by her supervisor that her actions are other than perfect. Recently, she dismissed a class without allowing adequate time for dressing. As the girls hurried from the locker room to avoid lateness to the next class, one child fell and was hurt. Miss Newman's Chairman spoke to her and suggested that as a matter of safety she allow the full seven minutes for dressing. She replied, "No one told me about the accident, and children fall on the stairs all the time anyhow." The next day, She again dismissed this class late. On another occasion, when the Chairman tired to engage her in quiet conversation for privacy, she moved away ten feet or more, saying that there was nothing Mrs. Ashepa had to say to her that couldn't be overheard by students. When reports of complaints to the principal from various staff members (deans, chairmen, etc.) accumulated, a meeting was held with Miss Newman and 8 or 9 other members of the faculty in an effort to help her and to extend an offer of support and a plea for friendliness. She rejected them all and let the group know that her handling of school situations was right and that of the others wrong. She then filed a grievance against the principal charging harassment, even though her presence at the meeting was voluntary, and the whole thing arranged with her approval and that of her advisor, Mr. Arnesen (U.F.T. Chapter Chairman). At this grievance (Step 2) she demanded to know specific names of complaining students. Every time I referred to an incident, she picked it up in detail, described it in detail, and acted as though her behavior in each instance was completely justified and sound. For example, she told one girl in her class that the girl was sick, and the girl replied "Look who's talking." Again, during conferences on Open School Night, she mimicked a foreignspeaking parent.

When the principal sent her a note, no matter how innocuous or politely worded, she becomes irate and challenging - even though the note may merely may merely may information. The accompanying note (Exhibit A) was sent to her. She asked for a meeting with the principal and the assistant chapter chairman (Mr. Gerewitz) to respond to it. She stated that she would not meet with the principal without having someone with her.

Recently, Miss Newman was demonstrating exercises to her physical education class. This required separating the legs. Her panty hose were split along a seam. And she was not wearing underpants. The class and her assistants were in a stir. Instead of turning the class over to an assistant, she continued to demonstrate. When the next day, her supervisor suggested that she wear underpants, she flew into a rage and called her a "lousy bitch."

She then went to a male teacher nearby, picked up her dress and showed him that she was wearing underpants. She repeated this performance the next day with Mr. Arensen, chapter chairman. A full period discussion was held among her, the chapter chairman, Mr. Rommer (formerly her chairman), and the principal. It became evident to me that she could not be reasoned with, and a note was sent to her (Exhibit B). She filed a grievance. In connection with this, the following events occurred. She scotch-taped the statement appearing in Exhibit C on to a table in the teachers' lounge. She brought the torn panty hose to the step 2 hearing, and asked the assistant superintendent to note the position of the hole. She distributed mimeographed sheets (Exhibit D) in the teachers' cafeteria. She brought the panty hose to the teachers' cafeteria to show her colleagues.

Subsequent to the Step 2 decision, she designated students for role playing in one physical education class. One girl was to pretent cramps, another to be wearing panty hose with a hole near the crotch. She interrogated the girls in the class where the original incident occurred, one line each day, as to their reactions to the incident. In the process, she dismissed them late.

Miss Newman is insistent upon the following of regulations by her fellow teachers and by students. When it is pointed out to her that she is inconsistent in regard to hew own behavior, she explains this away with complete self-justification.

Miss Newman overreacts to situations and appears unable to exercise self-control and reasoned judgment. Efforts at two-way discussions are unavailing; her response to written notes of record is to file grievances charging harassment and persecution. Generally speaking, she is rigid, hostile, and suspicious. She balloons molehills into mountains. Incidents which would be glossed over by most teachers are built into a cause by Miss Newman.

/S/ David Gordon
DAVID GORDON
PRINCIPAL

January 26, 1970

474 Form 4 ... AL 7.07 4 ... # 82

FAR ROCKAWAY HIGH SCHOOL David Gordon, Principal

Harrison 13,3650 19.

Office of
THE PRINCIPAL

To

Door Man Halland

Subject:

Defendant's
Exhibit III
on Motion for
Summary Judgment

Thure received a letter from the mother of Robin Four-mother adming that the be

taken out of your logions cleac.

you can provide in this connection and your professional reaction to this request.

David Gordon

ETHIBIT A

BOARD OF EDUCATION, CITY OF NEW YORK

FAR ROCKAWAY HIGH SCHOOL

BEACH TWENTY-FIFTH STREET AND OCUAN CREST BOULEVARD
FAR RCCKAVAY, N.Y. 11691

AVID GORDON, PRINCIPAL

FAR ROCKAWAY 7-6000

November 14, 1969

Miss Francine Mewman Far Rockaway High School DEFENDANT'S EXHIBIT LV ON MOTION FOR SUMMARY JUDGMENT

Dear Miss Newman:

It has come to my attention that on Mednesday, October 29, your panty-hose were torn at the crotch while you were demonstrating. Mevertheless, you continued to demonstrate to the students. What made the situation even more acute was the fact that you were not wearing underpants, and the students and your assistants were very conscious of this fact.

We all understand that accidents of this sort will occur. May I suggest, however, that in a case like this it would be proper for you to turn the conduct of the class over to one of your assistants in order to make the necessary personal adjustments. This would avoid any embarrassment to you and to the students, and would spare everyone the aukward reaction that tends to occur.

We all realize that the gym floors require special care, and street shoes should not be used. I have spoken to you about this, but I am taking the opportunity of mentioning it once again, since it is department policy.

Yours truly,

Mildrad M. Ashepa

Acting Chairman

Health Education Dept.

I have received a copy of this letter.

Signature

AD OF EDUCATION, CITY OF . .. YORK FAR ROCKAWAY HIGH SCHOOL BEACH TWENTY-FIFTH STREET AND OCEAN CREST BOULEVARD FAR ROCKAWAY, N. Y. 11691 DAVID GORDON, PRINCIPAL FAR ROCKWAY 7-6000 January 20, 1970 DEFENDANT'S EXHIBIT V Miss Francine Neuman ON MOTION FOR SUMMARY Far Rockaway High School JUDGMENT. Dear Miss Newman: On Friday, January 16, Linda Bro., a student in your second period gya class, visited me in my office. According to Linda you had suggested that she upook to me about the panty hose incident. Tanda was uncomfortable and embarrassed. She told me that the students in the gym class were not hystorical; rather she believed that they thought the incident funny. This is one instance of actions on your part involving students that have been brought to my attention. I understand that you had a group of students in your second period class engage in role-playing on Friday, December 5th, in which one of them was to pretend that she was wearing panty hose that split. I am told, also, that you interrogated students in your second period gym class Monday, December 8th, regarding the mishop that you experienced originally. It is neither wise nor desirable to involve students in this. Such action serves only to heighten parall awareness of an incident which would otherwise to forgotten. I suggest that you avoid using your students in this way. If the statements in this letter are inaccurate or incorrect, in any respect, I should appreciate your letting me know in person or in writing. Very truly yours, David Cordon Principal DG:JF

I have received a copy of this letter.

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ARTICLE IV — LEAVES OF ABSENCE AND OTHER ABSENCES OF MEMBERS OF THE TEACHING AND SUPERVISING STAFF

Section 106. 1. Except as otherwise provided in subdivision 2 of this Section, the failure of a member of the teaching and supervising staff to attend upon any portion of lawfully assigned duties not exceeding the maximum daily service prescribed by these By-Laws, except in an emergency, shall constitute absence from duty. The failure of a member of the teaching and supervising staff to report for service at the time fixed for reporting for duty shall constitute lateness, provided such member is present at the time set for the opening of the school session, morning or afternoon. If, however, such member dees not report for service until after such time he shall be considered absent, the period of such absence being reckoned from the time sor for him to report for duty. All lateness and absence from duty, and nea-attendance construed by subdivision 2 of this Section not to be absence from duty, shall be recorded in the school timebook is accordance with the provisions of subdivision 11 of this Section, and subdivision 9 of Section 108 of these By-Laws and on the payroll. No member of the teaching and supervising staff shall absent himself from duty except for due and proper cause. He shall notify his superior either before such absence occurs or as soon thereafter as possible and shall give the cause of his absence and its probable duration. Absence from duty, except for satisfactory cause, shall be deemed neglect of duty. All absence from duty without due and proper cause shall be reported immediately to the assistant superintendent who shall take such action with reference to the case as he may deem necessary. Except as provided in subdivisions 2 to 15 inclusive, of this Section, absence or non-attendance of a regular member of the supervising and teaching staff shall result in salary deduction in accordance with Section 483 of these By-Laws; while absence or nonattendance of one serving as a regular substitute shall result in salary deduction in accordance with Section 484 of these By-Laws.

2. The following absence on the part of any member of the teaching and supervising staff, or regular substitutes, unless specifically excluded, in accordance with the provisions of this sub-division, shall not be regarded as absence from duty, but as non-attendance. The reason for such absence certified to by the principal and/or other responsible officials as being excusable under the Bylaws of the Board of Education s'all be noted on the payroll, and the application shall be placed in the individual's school file. (As amended July 27, 1961.)

(a) Absence for the purpose of visiting other schools or school activities, provided permission shall have been obtained, on written application, as follows: (1) In the case of a principal, from the Superintendent of Schools; (2) in the case of a director and inspector, from the associate superintendent in charge; (3) in the case of an

DEFENDANT'S
EXHIBIT VI
ON MOTION
FOR
SUMMARY
JUDGMENT

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EXHIBIT "B"

assistant to principal or a teacher, from the assistant superintendent in charge, or if no assistant superintendent is assigned, from the associate superintendent in charge. Permission shall be granted for not more than three days in any school year. A report of the results of the observation of the work of the schools or activities visited shall be made within ten days to the person granting such permission. The assistant superintendent shall report each month to the associate superintendent in charge of the number of teachers excused.

(b) Absence due to attendance at the funeral of an associate, provided permission shall have been granted by the assistant super-

intendent or the associate superintendent.

(c) Absence on account of the requirements of the Board of Education or of a committee thereof, of the Superintendent of Schools, of the Board of Superintendents or of the Board of Examiners.

- (d) Absence on account of attendance at court or before any public board, commission or officer on business of the Board of Education, or under subpoena as a witness in a case in which the teacher or anyone related to the teacher in any way has no financial or personal interest whatsoever either directly or indirectly and where the teacher's attendance is not required as a result o any employment, occupation or voluntary act on the part of the teacher
- (e) Absence with permission in accordance with subdivision 15 of this Section.
- (f1) Absence on account of military or naval d ity in accordance with the requirements of Section 242 of the Military Law of the State of New York.
- (f2) Entrance into the military service shall be considered leave of absence with pay during the first thirty days of such service unless provision for payment during such military service is otherwise provided. Regular substitute personnel are not included within the provisions of paragraph (f2). (As amended Nov. 26, 1963; eff. Sept. 4, 1963.)
- (g) Lateress or absence for less than one-half day, on account of extraordinar delay in transportation, provided the absence shall have been excused for less than one-half day by the assistant superintendent or the associate superintendent. The Superintendent of Schools may excuse absences of more than one-half day, but not more than two days, on account of extraordinary delay in transportation.
- (h) Absence on account of compliance with quarantine regulalations of public health officer or of a department of health, provided a certificate shall have been secured from a public health officer or a department of health showing the duration of period of quarantine, with the initial and terminal dates.

- (i) In the case of death in the immediate family, absence on the day of death and all school days within the period of three calendar days immediately following the day of death shall be excused. The "immediate family" includes a parent, child, brother, sister, grand-parent, grandchild, husband, wife, or parent of a husband or wife, or any relative residing in the personal household. The relationship of the deceased to the applicant, with the date of death and the date of the funeral, shall be shown in the application. In addition thereto, the Superintendent of Schools shall have the power to excuse the absence of a teacher with pay beyond the time allowed by the Bylaws when such absence is necessary because of attendance at the funeral of a relative in the immediate family.
- (j) Absence of not more than one day due to attendance at the funeral of a brother-in-law or sister-in-law, or son-in-law or daughter-in-law, or niece or nephew, or aunt or uncle who is not a member of the immediate household.
- (k) Absence for the observance of religious holy days, and any absence for jury duty shall not be regarded as absence from duty, but as non-attendance. Except as provided in Section 483 of these By-Laws, for such non-attendance there shall be deducted from each non-attendant an amount equal to the pay of a substitute for each school day of such non-attendance, provided, however, that in no case shall the amount deducted from the salary of the nonattendant be greater than one-twenty-fifth of a month's salary for each day of such non-attendance. A teacher who intends to be such nonattendant shall give to the principal of the school at least two days' notice, in writing, of such proposed non-attendance. The provisions of this clause shall apply only to persons employed on an annual basis. The provisions for salary deduction herein contained are not applicable to regular substitute personnel. As to regular substitute personnel, salar, deduction hereunder for each day of non-attendance shill be made at the rates provided in Section 484 of these By-Laws, or at a rate no greater than the minimum pay of a substitute, whichever is lower. (As amended July 27, 1961; Nov. 26, 1963, eff. Sept. 4, 1963.)
- (1) Absences due to the observance of holy days shall be reported as such and shall not be considered in determining the ratings of teachers.
- (m) Absence to receive a degree, to attend graduation of a son, daughter, husband or wife may be excused with pay for one day with the prior approval of the princ oal and the assistant superintendent. Where the degree to be conferred or the graduation exercises to be held are at a place remote from the City of New York, necessitating travel on school days to and from such place, prior to and following

the day on which the exercises are held, not more than two additional days of absence may be excused with pay; provided, however, that if the total absence is to be for more than one day, prior approval by the principal, the assistant superintendent and the Associate Superintend in Charge of Personnel must be obtained. In no case shall any member of the teaching and supervisory staff, et al, be excused for more than three successive calendar days. A substitute may be employed for absences under this paragraph only with the permission of the Superintendent of Schools. (As amended Dec. 22, 1960, eff. Feb. 1, 1961.)

3. Absence from duty due to personal illness on the part of a member of the teaching, supervisory staff or attendance staff under regular appointment shall be subject to the provisions enumerated hereinbelow. This subdivision is not applicable to regular substitute personnel whose absence shall be subject to salary deduction pursuant to provisions of Section 484 of these By-Laws.

(a) Absence from duty due to personal illness on the part of a member of the teaching, supervisory staff or attendance staff may be

excused with pay for ten school days per school year.

- (b) Unused allowance of days for absence from duty due to personal illness in any school year shall be cumulative and available for future use to a maximum of 200 days. A member of the administrative staff serving on an annual salary under appointment by the boal of Education who is appointed to the teaching and supervising staff, including school secretarial service and attendance staff, shall be permitted to transfer his unused sick leave allowance, up to a maximum of 190 days.
- (c) All applications for excuse with pay of absence due to personal illness filed by members of the teaching or supervisory staff whose absence does not exceed ten consecutive school days, and which are approved by the principal, shall be placed in the individual's school file. The absence will be noted on the payroll but no deduction will be made unless the individual has used up his or her accumulated absence reserve. A teacher, whose application under this paragraph has been disapproved by his or her principal, shall have the right to refer the matter to the appropriate assistant superintendent for his adjudication, provided such referral is made in writing not later than 10 days after disapproval by the principal. (As amended July 27, 1961.)
- (d) Applications for excuse with pay for absence due to personal illness in excess of ten consecutive school days in a school year shall be forwarded to the School Medical Director. If approved the applications will be returned to the school so that payment can be

made unless the individual has used up his or her accumulated absence reserve. The applications shall then be placed in the individual's school file. (As amended July 27, 1961.)

(e) Except as otherwise determined by the Superintendent of Schools, applications for excuse of absence under this subdivision, in the form prescribed by him, shall be made as soon as possible after the termination of absence, but not later than thirty calendar days follow-

ing such termination of absence.

(f) Applications for excuse with pay for absence due to personal illness must be accompanied by a certificate of a physician, or other doctor as provided herein, duly licensed in the State of New York or in the state where the applicant resides. Certificates may also be accepted from osteopaths; from dentists or podiatrists, when appropriate and within their professional spheres of competence; and from Christian Science practitioners listed in the official Christian Science Journal. All such certificates are subject to review and approval by the School Medical Director at his discretion. (As amended July 27, 1961; June 26, 1963.)

1. Absence of a total of our days or less in any school year may be excused on application without the requirement of said certificate, provided that no more than three such absences may be consecutive. The Superintendent of Schools may at any time under special circumstances suspend the application of the provision for excuse of absence without the necessity of said certificate, provided that he shall report to the Board of Education as to his action in the matter at the next succeeding meeting of the Board. (As amended July 27, 1961; Nov. 26, 1963,

eff. Sept. 4, 1963.)

(g) In the case of long term illness extending from one calendar month into another, a teacher, supervisor or member of the attendance staff may apply at the close of each calendar month during the period of illness, for excuse with pay for absence due to personal illness.

(h) In the case of absence from duty due to personal illness on the part of a member of the attendance staff, applications shall be filed originally with the district supervising attendance officer and shall be processed in accordance with regulations to be issued by the Superintendent of Schools. These regulations shall as far as possible, parallel the provisions stated in (c), (d), (e), (f), and (g), supra, and such regulations as the Superintendent of Schools may issue with respect to absence of members of the teaching and supervisory staff.

3a. Absence from duty on retirement leave of absence with full pay on the part of a member of the teaching, supervising staff, or attendance staff under regular appointment, who is a member of the Teachers' Retirement System and who will be eligible for service retirement upon completion of said retirement leave, shall be subject to the provisions enumerated herein below: (As amended Nov. 22, 1960.)

- 1. A retirement leave of absence with full pay shall be granted on the basis of one half of the accumulated unused sick leave up to a maximum of one school term, or the equivalent number of school days. For this purpose one school term or the equivalent number of school days thereof, shall be defined as five calendar school months, exclusive of July and August.
 - 2. A retirement leave of absence shall be terminated when:
- (a) a member on such leave files an application with the Teachers' Retirement System for immediate retirement;
- (b) a member on such leave files an application with the Associate Superintendent in Charge of the Division of Personnel for reinstatement to active service;
- (c) a member on such leave applies to the Associate Superintendent in Charge of the Division of Personnel for excuse of absence with pay owing to personal illness, provided such application for excuse of absence with pay shall be approved by the Medical Director of the Board of Education.
- 3. A member who has been on retirement leave of absence and who terminates such leave, shall be entitled to the total accumulated unused reserve for excuse of absence with pay owing to personal illness, minus the rumber of school days actually used du ing the period of the retirement leave.
- 4. No member is eligible at any time to receive retrement leaves of absence in excess of a total of five calendar school months for all services in the Board of Education of the City of New York.
- 5. A substitute may be employed in the place of any member who is on retirement leave of absence.
- 6. Application for retirement leave of absence shall be made to the Associate Superintendent in Charge of the Division of Personnel at least one month prior to the initial date of the requested absence on the appropriate form to be provided. (As amended June 23, 1960.)
- 4. Absence from duty on the part of principals, teachers and other assistants (except teachers of special branches) in schools to which assistant superintendents are assigned in accordance with Section 41, subdivision 3 of these By-Laws, may be excused without pay for a sufficient cause and for a reasonable period, in whole or in part, by the Superintendent of Schools. Absence from duty on the part of all other principals, teachers and other assistants, including teachers of special branches, may be excused similarly, without pay by the associate superintendent in charge, subject also to approval, disapproval or modification by the Superintendent of Schools. (As amended Aug. 22, 1962.)

5. All applications for excuse of absence without pay shall be approved, disapproved or modified by the principal (or by the director in the case of teachers of special branches) and by the assistant superintendent or by the associate superintendent in charge if no assistant superintendent is assigned, and shall show the dates and cause of absence, and the reasons therefor in case of modification or denial. Action taken with respect to all applications, whether approved or disapproved by the principal, shall be entered on the appropriate school records. The applications shall then be forwarded to the office of the Assistant Superintendent for approval or disapproval. Only applications disapproved by the principal and/or assistant superintendent shall be forwarded by the Assistant Superintendent to the Office of the Associate Superintendent in Charge of Personnel. Those approved shall be returned to the principal for placement in the teacher's file. Regular substitute personnel may not be excused without loss of pay hereunder, except as otherwise provided in this section. (As amended Mar. 24, 1960.)

6. No excuse of absence with pay shall be granted to principals, teachers or other members of the teaching and supervising staff for whom

per diem or per session rates are provided in these By-Laws.

7. The Superintendent of Schools shall have power to grant leaves of absence without pay on application to members of the teaching and supervising staff for a period of three years or less for the purpose of study, restoration of health, or for other satisfactory reasons. All leaves of absence so granted shall be reported immediately by the Superintendent of Schools to the Auditor in charge of the Bureau of Firance, and any subsequent change in a terminal date shair also be eported.

The expiry date of the foregoing leave, of abeence without pay shall be January 31st or June 30th. Leaves of absence without pay shall be granted and accepted upon the condition that for the summer vacation period immediately following the school year in which the leave of absence without pay was granted, the teacher shall receive a pro rata salary payment and pro rata service credit, - such pro rata payment and service

credit to be calculated as follows:

The total number of days during which he shall have rendered service since the last summer vacation period for which he received compensation shall be divided by 190 days representing a school year and multiplied by 70 days representing a full vacation period. The result will represent the number of days for which he will be entitled to eccive salary and service credit for such summer vacation period, not exceeding the total of 70 days.

Notwithstanding any provisions of this subdivision of the Bylaws, no teacher, upon return to actual service, shall be placed on a salary step lower than the teacher's salary step immediately prior to the intial date

of the leave. (As amended July 27, 1961.)

7a. A member of the teaching and supervising staff who has exhausted the number of days accumulated to his credit for excuse of absence with pay, owing to personal illness, and who, in the opinion of the Medical Bureau of the Board of Education, will not be able to return to full service within one calendar month from the date the reserve is exhausted, shall be declared by the Superintendent of Schools in the status of an inactive employee without pay. Such employee shall immediately apply for and accept a leave of absence without pay for restoration of health. The expiry date of leave of absence without pay shall be January 31st or June 30th. Such inactive status and such leave of absence without pay shall take effect one calendar month from the date the reserve is exhausted. If the employee is unable to resume full service on the expiry date of the leave of absence without pay, the Superintendent of Schools shall continue such status, and such employee shall immediately apply for and accept a further leave of absence without pay for the current school term. Such status and such leave of absence without pay may be terminated at any time by the Superintendent of Schools upon the recommendation of the Medical Bureau of the Board of Education.

Failure by an employee to apply for and accept a leave of absence without pay in accordance with the provisions of this Section or to comply with any of the pertinent regulations shall be deemed neglect of duty and an act of insubordination.

Such inactive status and any such leave of upse ce without pay shall be granted and accepted subject to the conditions described in subdivision 7 supra.

- 8. The Superintendent of Schools may, upon application, grant leaves of absence with or without loss of pay and, in the case of leaves of absence without loss of pay, with or without expenses, to members of the teaching and supervising staff and to attendance officers for the purpose of attending conferences, meetings or conventions, and such leaves of absence so granted shall be reported by him to the Board of Education at its next regular meeting. (As amended Dec. 22, 1960, eff. Feb. 1, 1961.)
- 9. Under regulations approved by the Board of Ecucation, the Superintendent of Schools may grant, except to personnel serving as substitutes, regular or other than regular, sabbatical leaves of absence with pay for six months, covering a period from August 1 to January 31, inclusive, or from February 1 to July 31, inclusive, to superintendents, examiners, directors, assistant directors, teachers, attendance teachers, attendance officers, assistant attendance officers, library assistants, laboratory assistants, placement and investigation assistants, school secretaries and supervisors in the public day schools, on the condition that there shall be deducted from the salary of each person to whom such leave is granted, a percentage substantially equivalent to the ratio which the average rate of salary of regular

substitute teachers, substitute library assistants, substitute laboratory assistants, substitute placement and investigation assistants and substitute school secretaries for the appropriate year, multiplied by the number of persons granted such leaves during said year, bears to the aggregate gross salaries of all superintendents, examiners, directors, assistant directors, teachers, library assistants, laboratory assistants, placement and investigation assistants, school secretaries and supervisors to whom such leave have been granted during said year.

Sabbatical leaves may be terminated by the Superintendent of Schools prior to the initially established expiration dates thereof. In the event a sabbatical leave is terminated prior to the initially established expiration date, the total deductions from the salary of the superintendent, examiner, director, assistant director, teacher, library assistant, laboratory assistant, placement and investigation assistant, school secretary or supervisor whose

leave is so terminated shall be ascertained by:

(1) Applying the percentage described above to his gross monthly salary for the period of absence during the school term under such leave, and in addition thereto

(2) A deduction equal to 1/5 of the amount computed under paragraph (1), for each month of absence, or major fraction thereof,

during the school term under such leave.

The deductions described under paragraphs (1) and (2) are for the purpose of providing the compensation required to be paid as vacation pay to a regular substitute teacher, pursuant to Section 484 of these By-Laws.

Sabbatical leaves of absence with pay may be cancelled by the Superintendent of Schools when he application for cancellation is received prior to the first school day of the period of such leave. (As amended March 27, 1963.)

- 10. The principal of each school shall report to the assistant superintendent, or, if no assistant superintendent is assigned, to the associate superintendent in charge, all teachers and other assistants (except teachers of special branches) absent from school for a period of ten school days without leave, with a statement of the ascertained or probable cause of such absence, and its probable duration. The principal shall continue to report on each absent teacher or assistant fortnightly after the date of his first report. The principal shall give immediate notification in writing of the return to duty of a teacher or assistant who has been reported by him in accordance with the provisions of this subdivision. Absence of a principal or teacher in charge shall be reported by the acting principal or acting teacher in charge.
- 11. The assistant superintendent shall take all proper steps to secure the return to service, or the elimination from the service, of teachers and

others under his supervision absent without adequate cause. He shall report to the Asse ate Superintendent in Charge of Teacher Training and Personnel and to the division superintendent all cases of principals, teachers and other assistants reported as absent from duty for causes other than personal illness for a period of ten school days without leave, with a statement as to what steps have been taken by him in each case, and his recommendation. He shall continue to make report and recommendation fortnightly thereafter upon each such case until the principal, teacher or assistant has returned to service or until final disposition has been made of the case. The assistant superintendent shall report to the Associate Superintendent in Charge of Teacher Training and Personnel and to the School Medical Director all cases of principals, teachers and other assistants reported as absent from duty for personal illness for a period of more than ten consecutive school days without leave. He shall continue to make report thereafter upon each such case, and at such times and in such manner as may be determined by the Superintendent of Schools, until the principal, teacher or other assistant has returned to service or until other final disposition has been made of the case. Copies of the reports of the assistant superintendent shall be forwarded to the local school board. The provisions of this subdivision shall not be construed as abrogating the authority of the Superintendent of Schools to terminate the services of regular substitute personnel at any time.

12. The School Medical Director, after investigation, shall make to the Associate Superintendent in Charge of Teacher Training and Personnel such reports as he may deem proper or as may be required by such associate superintendent, with reference to the cases of absence because of personal illness reported to him in accordance with subdivision 11 of this Section.

The Associate Superintendent in Charge of Teacher Training and Personnel shall take such action as he may deem proper and as may be authorized by the Superintendent of Schools on the cases reported to him. He shall make monthly report to the Superintendent of Schools for transmission to the Board of Education on all cases of continuous absence from duty without leave for a period aggregating thirty days for causes other than personal illness, and on all cases of continuous absence from duty without leave for a period aggregating sixty days because of personal illness.

- 13. The Superintendent of Schools shall establish regulations which shall apply to teachers of special branches the method of report and follow-up of absence embodied in subdivisions 10, 11 and 12 of this Section.
- 14. Except with the approval of the Superintendent of Schools, members of the teaching and supervising staff and examiners who are obliged to be absent from duty on account of illness shall not go to places remote

from their places of abode in the City of New York or its vicinity for recovery of health, treatment for illness or other purpose affecting their mental or physical well-being, without submitting to an examination by a medical examiner of the Board of Education or without submitting a physician's certificate satisfactory to the School Medical Director of the Board.

- 15. Absence from duty on the part of any member of the teaching, supervising or examining staff, for the purpose of advocating or opposing any legislative or other measure or proposition affecting the public schools or the public school system, before any official or body having jurisdiction in the matter, is prohibited, except by express permission of the Superintendent of Schools, who shall concurrently report the granting of such permission to the President. (As amended Dec. 22, 1960, eff. Feb. 1, 1961.)
- 16. Any person granted a leave of absence under this section of the By-Laws is prohibited from serving in any capacity in any activity under the Board of Education during the period of the leave except at the specific call of the Superintendent of Schools. (Subd. 16 as added Feb. 23, 1961.).

LEAVES OF ABSENCE FOR MATERNITY AND CHILD CARE

- Section 107. 1. As soon as any regular or non-regular employee in the teaching staff shall become aware of her pregnancy, she shall apply for a leave of absence for the purpose of maternity and child care. The initial date of the leave shall be set as follows: Either (a) the employee may go on leave of absence status forthwith; or (b) after a physical examination of applicant by the Medical Staff of the Board of Education, she may remain on duty to a date to be specified and recommended by applicant's physician, if approved by the Director of the Medical Staff.
- 2. If a teacher becomes aware of a program conc tion during the summer vacation period, she shall on the first day on which she would normally report for duty in September, apply for a maternity and child care leave. The initial date of the leave shall then be set in accordance with paragraph 1 above. However, it shall be the duty of the teacher to inform the principal of her school of her prospective leave as soon as possible, so that appropriate arrangements in the school organization may be made before the opening of school.
- 3. In the case of regular and non-regular members of the teaching and supervising staff, said leave for maternity and child care shall be for a period of four years from the beginning of the September term following the date of such leave, except that a person on such leave shall have the right to apply for termination of such leave at any time after the birth of her child, provided the applicant's physician certifies that the applicant is in good physical condition and that the School Medical Director

C 136

BOARD OF EDUCATION OF THE CITY OF NEW YORK OFFICE OF PERSONNEL MEDICAL DIVISION 65 COURT STREET BROOKLYN, N. Y. 11201

HENE: 596-6050-1-2

Dear

Madam:

Fobruary 3, 1979

2:30 2.11. Will you kindly call at my office, Room 201 on Wednesday, February 11, 1970 at Experintendent of Schools. This request is made at the direction of the this examination by one person of your choice. Thank you.

Miss Francine Newman 102-45 70th Road Forest Hills, New York Very truly yours,

Sidney Leibouitz, M. D. Medical Director

OP 402 MED - 35 PADS - 7-68

HVQ

ZYHIRITECH

DEFORMIDM TO DEFORM SUPT. TAMEBORE H.LANG

DOARD OF EDUCATION

The City of New York

Report of the MEDICAL DIVISION

| | 7/7/70 |
|--|---------------------|
| ME OF TEACHER NEMAN, FRANCINE | SCHOOL FAR ROCK.ESQ |
| DME ADDRESS 108-48 -70th Rd., For. Hills | ABSENT SINCE |
| AGNOSIS Psychonourosis - passive aggre | |

DEFENDANT'S EXHBIT VIII ON MOTION FOR SUMMARY JUDGMENT

In accordance with a request from the Superintendent of Schools of Jenuary 28, 1970, this teacher was called for exchination in the Medical Division to evaluate bisarro behavior reported by her Principal.

She was seen on Fobrary 13, 1970 by two physicians who, in the course of examining her, found her thought processes to be over-productive and her judgment poor. She was seen in psychiatric committation on February 25, 1970. She was hypomenic. Psychomotric testing was done on April 13, 1970. Her record should en encitable, neurobie woman. Her control is poor, sho is emplosive and impulsive.

Hor psychoneurosis and passive aggressive personality characterized also by poor judgment and no insight, are

- 1. Not fit at prosent for teaching duty. COMMENDATION :
 - 2. Leave of Absence for purpose of health improvement till June 30, 1971.

SL:NP:mg

91

EXMISIT "1) "

EMANUEL FISHER, PH. D.
CLINICAL PSYCHOLOGIST

OF FIFTH AVENUE

NEW YORK, N. Y. 10011

GRAMERCY 3.5620

W

CLIENT: Newman, Francine DOWN OF BIRTH: 10/30/23

AGD: 47 - 0

DATE TESTED: 10/26/70

Wals, Rorschach, TAT, Figure Drawing

DEFENDANT'S EXHIBIT IX ON MOTION FOR SUMMARY JUDGMENT

A cheerful, expansive, outgoing individual, Miss N. was fully cooperative and responsive in the testing.

Miss N. achieved a full-scale IQ of 115: verbal 125, performance 100. Potentially capable of functioning well within the superior range, and even in the very superior range in some areas, a combination of depression, anxiety and self-involvement tends to reduce Miss N's intellectual efficiency. She does heat in these areas in which social structure and convention provide the essential guidelines for feeling, thought and behavior. Where, however, iddividual initiative is required to deal with nevel, complex and dynamic setuations involving abstraction or interpersonal relations, she performs less competently.

Dasically, Miss N emerges as a somewhat egocentric individual who is energetically and empassively involved in and committed to a rather becomistic style of life. There is no test-evidence of any thought or affect disorder. Apart from the depression and anxiety noted above there is no evidence of any significant neurotic symptomatology. What we do have evidence for is a stable characterological integration of a somewhat narcissistic and hedomistic nature.

Decause she is an energetic individual, Miss N is likely to come across to pacple as aggressive and combative. Actually, this impression grows out of

EXHIEST 'E"

her tendency to be broad and expansive in the expression of mood, thought or impulse. The content of her moods, thoughts and impulses are not at any point hostile or aggressive. At worst, she might be understood to be relatively insensitive to others because of her naive self-involvement. At best, she might be understood to be merely excessively self-assertive.

In her dealings with life and with people, Miss N is motivated by a relatively unsophisticated conventionality. Her definitions of right and wrong, of appropriate goals in life, of the relationship between people generally and the period specifically are highly formal, conventional and semewhat remantic and sentimental. She tends to adhere rather rigidly to these notions and to have difficulty in being flexible in adapting her thinking and responses to the chifting nuances of real situations and real relationships. This rigidity respectively with her characteristic tactlessness adds to the impression of the bativeness. There is nothing to indicate that her particular way of receiving and evaluating situations and relationships is in any way pathological or that she is unable to function alongside of and cooperatively with others. In a matter of fact, the more structured and convention a situation might be, the

here is no indication that Miss N is in any way incapacitated by psychological iddiculties which require treatment. There are, also no test indications that iss N is in any way incapable of performing any occupational task whatsoever for hich she is qualified by training and experience.

JNITED Federation of Teachers
OCAL 2 · AMERICAN FEDERATION OF TEACHERS, AFL-CIO
Alfiliated with New York State AFL-CIO, New York City Central Labor Council,
Empire State Federation of Teachers



260 Park Avenue South New York, N. Y. 10010 S Pring 7-7500

DEFENDANT'S EXHIBIT X ON MOTION FOR SUMMARY JUDGMENT

October 19, 1970

Dr. Sidney Leibowitz
Medical Division
Board of Education
65 Court Street
Brooklyn, New York 11201

Dear Dr. Leibowitz:

Enclosed is a copy of the request of Miss Francine Newman for her medical report to be sent to her physician. The report from your office was dated July 7, 1970.

Your personal attention in expediting this matter will be appreciated.

Sincerely,

Gladys Roth

Field Representative

encl.

GR/eb

Opeiu: 153

1/1981111"

106-48 - 70th Road Forest Hills, New York. September 4, 1970

Dr. Theodore H. Lang
Deputy Superintendent of Schools
65 Court Street
Brooklyn, New York 11201

DEFENDANT'S EXHIBIT XI ON MOTION FOR SUMMARY JUDGMENT

Dear Dr. Lang:

Upon receipt of the notice informing me that you have placed me on a forced medical leave from September 11, 1970 through June 30, 1971, I wish to avail myself of the independent medical evaluation provided in Article IV F 21 of the Agreement.

The physician I have selected is:

Dr. Al Valicenti 37-39 - 75th Street Jackson Heights, New York Phone #672-2666

I request that my medical report be sent to him immediately.

Inasmuch as I have been placed on involuntary medical sick leave, I expect that my cumulative sick bank would afford me compensation to the extent to which I am entitled. Please advise as to what procedures are necessary in order for me to receive the proper remuneration due me. Normally when one is ill procedures are common place. Since the Division of Personnel through its Medical Division has seen fit to declare inconvenience.

Sincerely,

Francine Newman

November 19, 1970

Dr. Sidney Liebowitz Director Medical Division 65 Court Street Brooklyn, New York

DEFENDANT'S EXHIBIT XII ON MOTION FOR SUMMARY JUDGMENT

Dear Dr. Liebowitz:

In early February of 1970 and subsequent thereto, I have been called for a series of medical examinations. I reported for all of these examinations.

On several occasions, I have requested that the medical report be sent to my physician. All of my requests have yet to be responded to. On November 19th, I was informed by Dr. Pool that the reason that the report was not forthcoming was that all of my requests were improper. I have since inquired of Dr. Pool as to what would be the proper request. Pursuant to Article IV f 21, I hereby request that you forward a medical report to Dr. Albert Valicenti, M.D. - 37-39 75th Street - Jackson Heights, Queens 11372.

Please consider this letter my formal release to forward the report to Dr. Valicenti.

I should hope that this request is now properly in order and that you honor this request as expeditiously as possible.

Sincerely,

Francine Newman File #: 144709

FN/bit

P.S. The reference to Article IV f 21 is to the collective bargaining agreement between the Board of Education and the United Federation of Teachers.

EXHIBIT "G"

December 1, 1970

DEFENDANT'S EXHIBIT XIII ON MOTION FOR SUMMARY JUDGMENT

Dr. A. Valiconti
37-39 - 75th Street
Jackson Heights, N.K.

Doar Dr. Valiconti:

At the request and with the authorization of Miss Francine Nowman, this information concerning her health leave is being sent to you.

This teacher was examined in the Medical Division February 13, 1970 and by a psychiatric consultant on February 25, 1970. Psychomotric testing of these examinations was that she had a psychonourosis; a passive aggressive personality discorder characterized by poor judgment, lack of insight, explosive and impulsive behavior which impaired her ability to perform her duties.

She was, thorefore, granted a health leave to June 30, 1971, in order that she might seek medical care to improve her health status.

We trust that this information will be of service to you in assisting her.

Vory truly yours,

SL:NP:mg

Sidney Leibowitz, M.D. Medical Director

EXH1,957 11111

70 HOV 4. AM 11:05

BOARD OF EDUCATION CITY OF NEW YORK

October 27, 1970

Mics Frencino Nevmon 103-48 70th Road Porest Hills, New York

DEFENDANT'S EXHIBIT XÍV ON MOTION FOR SUMMARY JUDGMENT

Dear Miss Meuman:

This is in response to your letter of September 4, 1970 requesting on Ad Hoe committee of physicians to evaluate your case.

Article IV F 21 of the Agreement between the United Pedereties of Teachers and the Board of Education states so follow:

"A regular teacher shall have the right to an independent evaluation by an ad her committee of physicians if the findingsof the Medical Division to the Superintendent has resulted in: (1) placement of the teacher on a leave of absence without pay for more than three months, or (2) termination of the teacher's services, or (3) a recommendation for disability rativement."

Since you have sufficient days in your cumulative sheened reserve to cover the medical leave, you do not fit into any of the three above entegories. Therefore, you are not entitled to an ad her committee under Article IV 7 21 of the Agreement.

Very truly yours,

THEODORE H. LANG Deputy Superintendent

THE:ESO:EXU

EXMIBIT "I"

BOARD OF EDUCATION OF THE CITY OF NEW YORK 65 COURT STREET, BROOKLYN, NEW YORK 11201 OFFICE OF PERSONNEL

ORE H. LANG SUPERINTENDENT ROSENDERG CK H. WILLIAMS SUPERINTENDENTS

WILLIAM FORST
TORD HOLMBERG
HARRY MILLER
MADELINE M. MORRISSEY
ASSISTANT ADMINISTRATIVE DIRECTORS

November 25, 1970

Miss Francine Newman 108-48 70th Road Forest Hills, New York DEFENDANT'S EXHIBIT XV ON MOTION FOR SUMMARY JUDGMENT

Dear Miss Newman:

A conference was held in this office on November 19, 1970 concerning your request for an ad hoc review. You were accompanied by Mr. Vito De Leonardis of the United Federation of Teachers. Dr. Pool of the Medical Office attended as did Mrs. Ostroff of the Office of Personnel.

Your contention was that you were placed on an involuntary leave of absence, and therefore, although you have enough days in your bank to cover this absence, you are entitled to an ad hoc review because you do not believe you are ill.

The Contract states that a teacher is entitled to an ad hoc review when the recommendation of the Medical Division has resulted in:

"(1) Placement of the teacher on a leave of absence without pay for more than 3 months..."

Mr. De Leonardis contended that the intent of Article IV F 21 (the ad hoc review) is that a substantive review of a medical decision is in order when the teacher is forced to take a lengthy period of leave against her wishes.

Dr. Pool contended that the intent of the paragraph was to prevent financial hardship without an adequate review of medical findings.

Since there is no payless period involved here, and since the Contract is specific in stating that an ad hoc review is called for only when a payless period of more than three months is involved, I regret to inform you that you are not entitled to an ad hoc review.

Very truly yours,

THEODORE H. LANG Deputy Superintendent

THL:BSO:rrw

cc: Mr. Vito De Leonardis, UFT

Dr. Sidney Leibowitz, School Medical Director

Exmisit " J"

APPEAL TO THE CHANCELLOR OF THE UNITED FEDERATION OF TEACHERS ... TO THE APPOINTMENT OF AN AD HOC MEDICAL COMMITTEE

Conference held on Tuesday, December 22, 1970, in Room 811, Board of Education, 110 Livingston Street, Brooklyn, New York, Irving Robbins, Hearing Officer.

Present:

Mrs. Gladys Roth, for the Appellant DEFENDANT'S EXHIBIT XVII
Mr. Vito De Leonardis, for the Appellant ON MOTION FOR
Dr. Naomi De Sola Pool, Medical Division SUMMARY JUDGMENT
Mr. Walter Krauss, Office of Personnel
Miss Francine Newman, Teacher.

Origin of the Appeal

The United Federation of Teachers protests that Article IV F 21 was violated, in intent if not in exact terms, when the request of Miss Francine Newman for ad hoc medical committee review was denied.

This article reads in pertinent part:

"A regular teacher shall have the right to an independent evaluation by an ad hoc committee of physicians if the finding of the Medical Division to the Superintendent has resulted in:
(1) placement of the teacher on a leave of absence without pay for more than three months, or (2) termination of the teacher's services, or (3) a recommendation for disability retirement."

"The ad hoc committee shall consist of one physician selected by the teacher, one physician solected by the Board of Education, and a third physician selected by the other two physicians.:

Facts of the Case

- l. After examination by the Medical Division, Miss Newman was placed on an involuntary medical leave for the 1970-1971 school year. Her cumulative absence reserve was large enough at the beginning of the school year to cover all the days of absence that would result.
- 2. Early in September the teacher requested review of the Mecical Division directive by an ad hoc committee of physicians. This request was denied because the teacher was not being placed "on a leave without pay for more than three months" or in fact for any other period of time.

Basis of the Appeal

- 1. The representatives of the Union argue that the intent of the Agreement was to call for review by an ad hoc committee at a teacher's request whenever an involuntary medical leave is to be of extended duration. They assert that the Board interpretation is too narrow in being based on the accidental circumstance that the teacher has a sizable cumulative absence reserve.
- 2. It is also contended that the teacher is in fact suffering financial hardship in that she is being required to draw upon a reserve that would otherwise be available to her at some future time should she then become ill.
- 3. In response, it is pointed out that the Agreement is very specific in indicating the circumstances under which a request for an ad hoc committee is to be granted. The point is further made that there is no impropriety in requiring the teacher to draw upon her absence reserve; the Medical Division has determined that she is ill and it is to meet just such contingencies that the absence reserve was created.

Relevant Considerations

Involuntary leaves of ext ended duration are not included unless they are also "without pay." No basis is found for supporting the grievant's contention that the intention was to include all leaves of considerable length.

Finding

The Hearing Officer recommends to the Chancellor that the appeal be denied.

Respectfully,

/S/ Irving Robbins

IRVING ROBBINS Hearing Officer

IR:sc

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Tellment

In the Matter of the Arbitration between UNITED FEDERATION OF TEACHERS

and

THE BOARD OF EDUCATION OF THE CITY Case Number: OF NEW YORK

DEFENDANT'S EXHIBIT XVIII on MOTION FOR SUMMARY JUDGMENT

Award of Arbitrator(s)

Francisco dinmen

THE UNDERSIGNED ABBURRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 8, 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Award, as follows:

The Grievance is denied.

James C. Hill, Arbitrator

, 1971 , before me personally

Dated: September 28, 1971

STATE OF New York COUNTY OF Suffolk

£3.:

On this 20 day of September

to me known and known to me to be the individual(x) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

FOAN L14-AAA-10M-7-69

TONALS CAPEL

as Lepites Harch 65, 1112

FXIIRILI

In the Matter of Arbitration between UNITED FEDERATION OF TEACHERS

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

Case No. 1339-0148-71

Re:

Francine Newman

DEFENDANT'S EXHIBIT XIX ON MOTION FOR SUMMARY JUDGMENT

In this case the Union charges that the Board has acted in violation of Article IV-F-21 of the 1969-1972 Agreement by its denial of the request of Miss Francine Newman for an independent evaluation by an ad hoc committee of physicians of the findings of the Medical Division which resulted in placing her on extended leave-of-absence for health reasons.

In its Demand for Arbitration the Union states the Remedy. Sought as:

"A finding that the refusal to grant the grievant herein an Ad Hoc Medical Review pursuant to the provisions of Article IV-F-21 of the Agreement violates such Agreement."

In its Brief the Union requests a finding of contract violation and "an order directing that such ad hoc review be conducted at once, and for a further award directing that should the ad hoc panel find that Miss Francine Newman should not have been placed on a leave of absence, that her cumulative absence bank be restored to the position it was at the time of the action of the Medical Division." (Brief, p. 16)

The essential facts are not in dispute. As of September, 1970, Miss Newman had been employed as a regular teacher for more than 20 years. She had accumulated 200 days in her cumulative absence reserve, the maximum allowed under the By-Laws of the Board of Education (Section 106-3 (b)).

Pursuant to a request of her supervisor, Miss Newman was examined by the Medical Division some time near the end of the 1969-70 school year. It was the recommendation of the Medical Division that Miss Newman required one year for the restoration of her health. The Office of Personnel approved a leave of absence for the following school year, from September 11, 1970 to June 30, 1971. Miss Newman was placed on leave for this period, during which time she received her regular pay and other contract benefits, as though employed, drawing on her cumulative absence reserve.

Miss Newman requested an ad hoc medical review of the findings of the Medical Division under Article IV-F-21 but this request was denied. Thereupon, the Union brought the present grievance.

Provisions of the Agreement and By-Laws

Article IV-F-21 of the Agreement provides in part:

1.1

"21. Medical Report and Review

"The report of the Medical Division on a teacher who was called for medical examination shall, upon written request of the teacher, be sent to the teacher's physician.

"A regular teacher shall have the right to an independent evaluation by an ad hoc committee of physicians if the finding of the Medical Division to the Superintendent has resulted in:
(1) placement of the teacher on a leave of absence without pay for more than three months, or (a) termination of the teacher's services, or (3) a recommendation for disability retirement.

"A request for an independent evaluation of the finding of the Medical Division shall be submitted in writing by the teacher to the Office of Personnel within 5 school days of receipt of notice from the Office of Personnel that he has been placed on leave of absence or that his services have been terminated, or that he has been recommended for disability retirement.

The ad hoc committee shall consist of one physician selected by the teacher, one physician selected by the Board of Education, and a third physician selected by the other two physicians.

"The findings of the ad hoc committee shall be reduced to writing and submitted to the Superintendent of Schools as an advisory opinion." (Emphasis supplied)

Section 106-3 of the By-Laws of the Board of Education provides in part:

"3. Absence from duty due to personal illness on the part of a member of the teaching, supervisory staff or attendance staff under regular ap-

pointment shall be subject to the provisions enumerated hereinbelow....

- (a) Absence from duty due to personal illness on the part of a member of the teaching, supervisory staff or attendance staff may be excused with pay for ten school days per school year.
- (b) Unused allowance of days for absence from duty due to personal illness in any school year shall be cumulative and available for future use to a maximum of 200 days."

Section 106-7-a of the By-Laws provides in part:

A member of the teaching and supervising staff who has exhausted the number of days accumulated to his credit for excuse of absence with pay, owing to personal illness, and who, in the opinion of the Medical Bureau of the Board of Education, will not be able to return to full service within one calendar month from the date the reserve is exhausted, shall be declared by the Superintendent of Schools in the status of an inactive employee without pay. Such employee shall immediately apply for an accept a leave of absence without pay for restoration of nealth. The expiry date of leave of absence without pay shall be January 31st or June 30th. Such inactive status and such leave of absence without pay shall take effect one calendar month from the date the reserve is exhausted. If the employee is unable to resume full service on the expiry date of the leave of absence without pay, the Superintendent of Schools shall continue such status, and such employer shall immediately apply for an accept a further leave of absence without pay for the current school term. Such status and such leave of absence without pay may be terminated at any time by the Superintendent of Schools upon the recommendation of the Medical Bureau of the Board of Education.

"Failure by an employee to apply for and accept a leave of absence without pay in accordance with the provisions of this Section or to comply with any of the pertinent regulations shall be deemed neglect of duty and an act of insubordination."

Principal Contentions

The Union con ands that it was the clear intent of Article IV-F-21 to provide teachers, faced with financial loss through involuntary leave, an opportunity to secure an independent review and evaluation of the findings of the Board's Medical Division. It was not the intent of the parties to exclude a person from this benefit merely because she was able to fall back on other reserves accumulated throughfaithful attendance over the years. By compelling Miss Newman to exhaust her accumulated reserve of 200 days, the Union argues, the Board has deprived her of the potential right to receive 100 days' pay when she retires (Article IV-E-f-m).

The Board's contention, the Union argues, would mean that a teacher who has used up her reserves would qualify for the ad hoc review, while a teacher who has built up ample reserves through faithful attendance, would not qualify. This is "obviously contrary to the intent of the parties." (Brief, p. 15)

In support of these contentions the Un'on cites numerous decisions of the courts and the Commissioner of Education in recent years which have set aside findings and recommendations of the Medical Division, and which have been highly critical of such decisions. It was in light of this background, the Union argues, that Article IV-F-21 was negotiated, to provide for independent review of the findings of the Medical Director.

The Board maintains that the meaning of Article IV-F-21 is clear on its face; that the provision for review of the findings of the Medical Division is strictly limited to specific situations, one of which is the placement of a teacher on leave of absence without pay; that the distinction between excused leave with pay and leave without pay is recognized in the By-Laws of the Board, which ante-date the Agreement, and which clearly contemplate that the status of leave without pay will be granted only after a teacher has exhausted her accumulated sick leave reserve; and that this distinction has been recognized in practice and was well known to the Union when this contract provision was first introduced in the Agreement effective July 1, 1967.

D: scussion

It is the central contention of the Board that a review of the findings of the Medical Division is available to the teacher who has exhausted her sick leave credits, and is placed on leave without pay, but not to the teacher who has built up a substantial reserve of accumulative sick leave credits which she is now compelled to use for purposes of involuntary sick leave. It is the central argument of the Union that this is manifestly unfair and contrary to the parties' intent. There is an obvious appeal in the argument, on grounds of equity. As the parties are well aware, however, the Arbitrator is not

empowered to base his decision on what may appear to be the fair and equitable course. He is strictly limited to the interpretation and application of the Agreement in accordance with its language and manifest intent.

The Union's claim has been considered from the standpoint of the language of the Agreement, the By-Laws of the Board
of Education and the evidence of past practice and bargaining history which might shed light on the intention of the parties.

It is my conclusion that the claim lacks merit on all of these
counts.

The language of the Agreement is plain. "A regular teacher shall have the right to an independent evaluation by an ad hoc committee of physicians if the finding of the Medical Division to the Superintendent has resulted in: (1) placement of the teacher on a leave of absence without pay for more than three months..."

(Emphasis supplied). There is no provision for such evaluation in the case of a teacher who is placed on leave of absence with pay.

There is no contention that Miss Newman was, or should have been, placed on leave without pay. Nor does the Union contest the right of the Board to place her in the status of excused absence with pay. "The Union is not, for the purposes

of this arbitration, arguing the legality of either the provisions of Section 106-7a of the By-Laws or of the action of the Board in compelling Miss Newman to exhaust her absence reserve bank." (Brinf, p. 15)*

The literal and restrictive construction of Article IV-F-21, as argued by the Board, finds support in the provisions of the By-Laws of the Board of Education, quoted above. The basic provision for the accumulation of sick leave is set forth in Section 106-3. Section 106-7a is addressed to the situation of a teacher who is placed on involuntary leave of absence as a result of findings of the Medical Division. It carries the clear implication that, to the extent that accumulated sick leave credits are available to the teacher, they will be used for this purpose and that the teacher will only be placed in the status of leave without lay when such accumulated reserves have been exhausted.

As to practice, Mr. Walter Krauss, Administrator, Office of Personnel, with many years of experience in matters of leaves of absence, testified without refutation that any person who,

^{*}At the time of the hearing the legal question was pending before the Court of Appeals. The Arbitrator has been informed that this question has since been decided, adversely to position taken by the Union.

in the judgment of the Medical Division, requires a period of absence for restoration of health is permitted to be absent with pay on the basis of her accumulated reserve, after which she is placed on leave without pay.

Finally, the record of contract negotiations supports the Board's position. In the negotiation of the 1965-1967 Agreement, the Union submitted the following demand:

"Teachers who are facing extended involuntary sick-leave and/or obligatory leave of absence without pay, or revocation of license based on a medical report should be entitled to a copy of the medical report issued by the Medical Board. Where the teacher is contesting the findings of the Medical Board, he shall be entitled to representation, in addition to counsel, by a physician of his own choosing. The teacher shall be entitled to an independent evaluation of the findings of the Medical Board by a tripartite Board of physicians, one chosen by the Board of Education, one by the teacher, and a third chosen by the first two! (Emphasis supplied)

In the 1967 negotiations the Union proposed:

"The following clause shall be added to Article IV:

"Where the teacher contests the findings of the Medical Bureau he shall be entitled to an independent evaluation of the findings of the Medical Board by a tripartite board of physicians, one chosen by the Board of Education, one by the teacher, and one by the first two."

The 1965 demand was rejected in its entirety. The provision for medical review was first adopted in the 1967-69 Agreement. The nature of the Union's demands, coupled with the

provisions of the By-Laws and the evidence of practice, clearly indicates that both parties were fully aware of the distinction between leave with pay and leave without pay, and of the limited and restrictive nature of the provision finally adopted in the 1967-69 Agreement, and continued without change in the current, 1969-72, Agreement.

James C. Hill

108-48 70 Road Forest Hills, New York 11375 September 8, 1971

Dr. Frederick Williams
Deputy Superintendent of Schools
Board of Iducation
65 Court Street
Brooklyn, New York 11201

DEFENDANT'S EXHIBIT XX ON MOTION FOR SUMMARY JUDGMENT

Dear Dr. Williams:

On July 31, 1970, I was placed on forced sick leave for the period beginning September 11, 1970 through June 30, 1971.

The UFT initiated a grievance on November 11, 1971 to obtain an adhoc medical review for me under the provision stated in Article IV F 21 of the Agreement.

The arbitrator has not yet rendered his decision. Although my leave terminated over two months ago, the Board's Medical Division has not yet summoned me for an examination for reinstatement to duty on September 10, 1971.

Since I am eager to return to service as soon as possible, I am requesting that the necessary action be taken by you. This request in no way concedes the fact that I am o, have been ill and in no way waives my right to any remuneration due me nor does it waive my right to the adhoc review in the event that the arbitrator rules in my favor.

Your expeditious attention to this matter will be appreciated.

Sincerely yours,

sancine Euman

FRANCINE NEWMAN

FM:GR:sa

CC: Sidney Leibowitz, M.D.

Please exce for Josephore California

EXMISIT WIT

Tidan Liberate Tila. 108-42 701/2 R.D. Faces Hills, THE 1875 Septent. 16, 1771 Ozar Dr. Leibority Il recovered your letter jolan- requesting that of appear for examination wie Commention will my potter to rechool. I am unally to appears on the Union and the Board of Education meriting that, day. Kindly nor-a-Redules and symmitten forme, efter the asid, and I phase offelar. Succiely. Francis 10 Trum

Pillen "

BOARD OF EDUCATION OF THE CITY OF NEW YORK OFFICE OF PERSONNEL MEDICAL DIVISION 65 COURT STREET BROOKLYN, N. Y. 11201

DEFENDANT'S EXHIBIT XXII
ON MOTION FOR SUMMARY JUDGMENT

MEDICAL DIVISION

-CHE: 596-6050-1-2

Dear

October 5, 1971

We colmouledge your lebber of September 16, 1971.
Will you kindly call at my office, Room 201, Henday, October 18, 1971 between 2:00 and 4:00 p.m. for enamination in connection with your fitness to return to daty. Thank you.

Francine Berman. 103-48 700h Read Forest Halls, N.Y. 11375

Very truly yours,

Sidney Leibowitz, M. D. Medical Director

:: Far Rockersy H.S.-Q § 2557. Protection of rights exercised under licenses issued by a board of education in a city having a population of one mallen or more

No person shall forfeit any right given to him under a license issued by a board of education in a city having a population of one million or more, pursuant to this chapter, because of absence while in service in the armed forces of the United States or in the service of the American Red Cross. Any person may at any time within six months after his discharge from service in the armed forces of the United States or the American Red Cross make application to the license issuing authority by affidavit setting forth that he or she has been in service in the armed forces of the United States or the American Red Cross during world war II and has been discharged from such service and that he desires the license theretofore issued to him or to her to be reissued as of the date of such application, and it shall be the duty of the licensing authority to reinstate such license as of the date on which application is made.

L.1947, c. 820; formerly § 2517; renumbered 2567, L.1950, c. 762, § 2, eff. July 1, 1951.

Historical Note

Section derived from Education Law of 1910, \$ 870-c, added L.1942, c. 928.

Note of Commission on 1947 Revision.—Section revised; former \$ 870-c; minor changes in phraseology; surplus comma deleted.

Library References

Schools and School - Districts

C.J.S. Schools and School Districts § 165.

§ 2568. Superintendent of schools authorized to require medical examination of certain employees of certain boards of education

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed.

16 McKinney 55 2101-5500-14

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ExhibitI

DEFENDANT'S
EXHIBIT
XXIII ON
MOTION FOR
SUMMARY
JUDGMENT

The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

L.1947, c. 820; formerly § 2518; renumbered 2568, L.1950, c. 762, § 2, eff. July 1, 1951.

Historical Note

Section derived from Education Law of 1910, \$ 870-a, added L.1041, c. 572, § 1.

Note of Commission on 1947 Revision.—Section revised; former \$ 870-a; missing commas inserted.

Cross References

Disability retirement, medical examination for, see section 511.

Library References

Schools and School

Districts

C.J.S. Schools and School Districts §§ 154-158, 171.

Notes of Decisions

Generally 2
Construction with other laws 1
Medical reports, examination of 5
Refusal to submit to examination 4
Report recommending examination
3

I. Construction with other laws

Enactment of section 913 which contained similar language to that found in previously enacted section 2568 and which was inserted into article relating to medical and health service affecting all pupils except those in city school districts of New York, Buffalo, and Rochester required examination into intent of Legislature, a going beyond the apparent and unambiguous language of section 913 and consideration of the spirit and purpose of the act and objects to be accomplished. Gordon v. Board of Ed. of City School Dist. of City of New York, 1964, 45 Misc.2d 28, 255 N.Y.S.2d 895.

2. Generally

Unless board of education's requiring assistant principal to submit to medical examination was arbitrary or capricious or in violation of rules of board, court could not interfere. Kropf v. Board of Ed., 1962, 34 Misc. 2d 8, 223 N.Y.S.2d 62.

Superintendent of schools had power to decide whether assistant principal should be directed to submit to medical examination and court could not interfere with such determination, in absence of showing that it was arbitrary, capricious or unreasonable. Id.

This section has no bearing on question of retirement but only regulates the right granted to superintendent to require physical examinations. Silverman v. Moss, 1951, 107 N.Y.S.2d 475.

3. Report recommending examina-

Requests for medical examinations were sufficient to authorize superintendent of schools to require assistant school principal to submit to such examinations. Kropf v. Board of Ed. of City of New York, 1963, 18 A.D.2d 919, 238 N.Y.S.2d 757.

Principal's statement enumerating specific actions by teacher satisfied

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At a Special Town, Part II of the Express Court of the State of New York, hold in and for the County of Kings, at the Companies, 360 Adems Street, in the Lorough of Brooklyn, City of New York, on the Lad day of March, 1972.

PRESENT:

HON.

HON WANK E. SAMANSKE GGY3AT

Justice.

. In the Natter of the Application

10

PRANCINE NEWMAN,

rn CE

DEFENDANT'S EXHIBIT XIV ON MOTION FOR SUMMARY JUDGMENT

Petitioner, The Contract of Artica for a Judgment curposant to Article 3 of the Civil Practice Law and Bules

OFFER TO SHOW CAUSE

-againet-

DAVID COMDON, PRINCIPAL OF FAR ROCKAWAY : LICH COMOON, QUEUE, WEN YORK and HOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF HEW YORK,

Responder to.

On the annexed petition of FRANCINE MEMMAN,

duly verified the let day of March, 1972,

LET the respondents, DAVID GORDON, PRINCIPAL OF FAR ECCHAMAY HIGH SCHOOL, and DOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, or their attorney, show cause at a Special Term, Part I of this Court, to be held in and for the County of Kings, at the Courthouse, 360 Adams Street, Borough of Brooklyn, City of New York, on the 13 ch day of March, 1972, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard,

WH! the Count should not grant an order:

- 1. Commanding and directing the respondent Board of Education of the City School District of New York to restore the petitioner to active teaching duties.
- 2. Commanding and directing the respondent
 Board of Education of the City School District of New York
 to rescind, cancel and withdraw the order of July 31, 1970
 heretofore issued placing the petitloner on forced leave of
 absence from September 11, 1970 through June 30, 1971.
- 3. Commanding and directing the respondent Board of Education of the City School District of New York, to rescind, cancel and withdraw the order of January 18, 1972 heretofore issued placing the petitioner on forced leave of absence from September 10, 1971 through June 30, 1972.
- 4. Commanding and adjudging that petitioner's accumulated sick leave days be restored to her for the period of her forced leave of absence between September 11, 1970 and June 30, 1971, and that the sums paid to her be credited against the salary due her instead of against sick leave.
- 5. Commanding and adjudging that petitioner be paid her salary as a high school teacher in respondent Board of Education of the City School District of New York's employ from and after September 10, 1971 with interest on each monthly installment thereof from the date of accrual to the date of payment.

- 6. Commanding and directing the respondent
 Board of Education of the City School District of New York
 to serve with the answer to this petition all medical
 reports pertaining to the petitioner obtained by its Medical
 Bureau subsequent to the recommendation by her Principal,
 David Gordon, that she be given a medical examination.
- 7. Commanding and directing the respondents herein to cease and desist from any and all acts prejudicing the rights of petitioner insofar as such acts are contrary

her contractual, legal and professional rights, and constitute severe and relentless harassment of petitioner.

- 8. Directing a jury trial if necessary to a favorable determination of the proceeding.
- 9. Granting the petitioner such other and further relief as the Court may deem just and proper in the premises.

Pending the hearing and determination of this application, betitioner's forced leave of absence pursuant to the letter of the respondent Board of Education of the City School District of New York dated January 18, 1972, be and hereby is stayed, and pending the hearing and determination of this application, petitioner shall be restored to active teaching duties and her salary paid to her as a Migh School Teacher.

Sufficient reasons appearing therefor, let service of a copy of this order and the papers upon which it is based on the respondents on or before the 6 th day of March, 1972, be deemed sufficient.

ENTER

Justice of the Supreme Court

SUFFREE COURT OF THE STATE OF HEM YORK COULTY OF KINGS:

In the Metter of the Application

01

FRANCISE MEMMAN.

Potitioner.

for a judgment pursuant to irticle 78 of the Civil Practice Law and Rules

PUTTITION

-againat-

DAVED COUDCH, PREMOTPAL OF FAR ROCHAWAY HELD COULDED, COURTED, NEW YORK and BOARD OF RECOLUTE OF THE CETY SCHOOL DISTRICT OF NEW YORK,

Respondents.

TO THE CUPREME COURT OF THE STATE OF HEW YORK,

the positioner above named, by WILLIAM COFFEN, her atterney, for her position herein, respectfully shows and allogen: /

- 1. Potitioner is a citizen of the United States and a resident of the State of New York.
- 2. The public schools of the City of New York are under the general management and control of the respondent Bourd of Education of the City School District of New York, subject to the statutes made and provided.
- 3. The respondent, DAVID GORDON, is end has been the Principal of Far Rockaway High School, For Rockaway, Queens, New York, for all of the times herein involved.

- 4. Potitioner has been employed on the teaching staff of the public school system of the City of New York for twenty-six years. She commenced her services in the public school system in September, 1945 as a substitute Teacher of Health Education assigned to the Far Rechaway High School, Queens, New York.
- 5. In or about September, 1952, petitioner was duly appointed a regular Teacher of Health Education in the Senior High Schools.
- 6. In June, 1955, the respondent Board of Education of the City School District of New York duly granted the petitioner tenure in her position as a regular Teacher of Health Education in the Senior High Schools.
- 7. During all her services as a Teacher of
 Health Education in the Senior High Schools of the City of
 New York, petitioner's services were always rated satisfactory
 and she received numerous commendations from parents, teachers
 and supervicors, except that for the academic year from
 September, 1969, through June, 1970, Mr. David Gordon,
 Principal of the Far Rockaway High School on June 30, 1970
 rated petitioner's pervices for that year "Unsatisfactory",
 based on unsubstantiated, unverified and contrived charges.
- 8. During the academic year of September, 1969, through June, 1970, petitioner incurred the enmity of David Gordon and of Mrs. Fildred Ashepa, Acting Chairman of the

Girls' Health Education Department, because petitioner told
Mr. Gordon that she objected to Mrs. Mildred Ashepa's appointment as Acting Chairman of the Girls' Health Education Department beginning in February, 1969, inasmuch as there were
three other Health Education Teachers with vastly more
seniority and possessing the necessary competence who were
not offered the position of Acting Chairman.

9. On or about January 26, 1970, Mr. Gordon sent a letter to Dr. Nathan Brown, Superintendent of Schools, requesting that a medical examination be given to the petitioner to determine her mental capacity to perform her duties on the basis of a so-called "report" which he annexed to the request. A copy of the letter and "report" is hereto annexed and marked "Exhibit 1".

request for petitioner's physical and medical examination at the Board of Education was in petty retaliation for her legitimate resort to the grievance procedure provided in the United Pederation of Teachers Collective Dargaining Agreement. Indeed, Nr. Gordon had previously threatened the petitioner with forced examination by the Medical Eureau when the petitioner asked for identification of the "swarms of parents" who, according to the unsupported contentions of Mr. Gordon, had complained against the petitioner.

matters in an effort to create the impression that the petitioner was mentally ill. For example, the primary emphasis in the "report" is upon an incident during which the petitioner's panty hose split in a seam along the thigh while she was demonstrating a modern dance leg exercise to her students all of whom are female. Through distortion and misrepresentation the "report" refers to this incident for which the petitioner could in no reasonable way be held responsible as evidence of petitioner's poor mental health.

The "report" referred to a three and one-half year old incident as though it were current. The "report" condemned petitioner's assignment of poor ratings to a number of her students, exaggerated grossly the proportion of such ratings, and distorted the situation to create an impression that petitioner was unbalanced. At the same time, Mr. Gordon did not indicate that Mr. Robert G. Rommer, petitioner's chairman at the time, generally approved her handling of the situation. A copy of Mr. Rommer's letter dated November 9, 1966, generally commending petitioner's services is hereto annexed as "Exhibit 2".

Andther example of Mr. Gordon's distortion occurred while petitioner was grieving over the death of

her mother. Some of the petitioner's colleagues who had cooperated with Mrs. Ashepa in her effort to make the petitioner's working conditions unbearable, sent donations to the Cancer Society in her mother's memory. After discussion with her family, the petitioner decided to reject such donations as hypocritical, and Mr. Gordon cited the incident as indicative of petitioner's poor mental health.

- as justification for requesting the medical examination of the petitioner, with a view toward procuring fer forced leave of absence, the "report" in fact actually contains no facts or circumstances upon which a recommendation for medical examination could legally be predicated in accordance with the Education Law, Section 2568.
- 13. Mr. Gordon reiterated the numerous false and irrelevant contentions of his "report" recommending petitioner's medical examination as pretended justification for the "U" rating he gave the petitioner on June 30, 1970. (Supra, par. 7)
 - 14. Education Law, Section 2568, provides as follows:

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that

such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

15. Upon information and belief, the purposes and intent of Section 2568 of the Education Law is to authorize a supervisor to request and the Superintendent of Schools to order a medical examination of an employee of the Board of Education who has given some evidence that she is mentally or physically incapable of performing her duties satisfactorily.

16. Petitioner has given no evidence of mental incapacity to perform her duties satisfactorily. On the contrary, she has always performed her duties in a highly satisfactory manner, and her attendance and health record over a twenty-six year period has been outstanding, with the result that she accumulated two hundred sick leave days which the respondent arbitrarily required her to exhaust.

"report" of January 26, 1970, and in disregard of petitioner's superior performance, health and attendance record, the petitioner was required by the respondent Board of Education's Medical Director, Sidney Leibowitz, H.D. to submit and did submit to examination by two Board of Education physicians on

February 13, 1970, by Dr. Morris Isenberg, a psychiatrist, on February 25, 1970, and by Dr. Samuel Prensky, a psychologist, on April 13, 1970.

of petitioner conducted pursuant to the direction of the Medical Eureau of the Board of Education did not warrant the conclusion that the petitioner is mentally unqualified to perform her duties. Nevertheless, the Medical Eureau arbitrarily and capriciously recommended petitioner's forced leave of absence from September 11, 1970 through June 30, 1971. A copy of the respondent Board of Education's letter of July 10, 1970, signed by Theodore H. Lang, Deputy Superintendent of Schools, addressed to Mr. Gordon, quoting the Medical Director's recommendation is hereto annexed as "Exhibit 3". A copy of the respondent Board of Education's letter of July 31, 1970 addressed to the petitioner ordering her absence from September 11, 1970 to June 30, 1971, is hereto annexed as "Exhibit 4".

19. On September 4, 1970, petitioner sought review of the Medical Director's recommendation by an ad hoc committee of physicians as apparently authorized by the contract between the respondent Board of Education and the United Federation of Teachers, but the respondent Board of Education denied such review to the petitioner on the

capricious and irrelevant ground that she had adequate sick leave to cover the period of her absence.

20. From September 8, 1970, through October 16, 1970, petitioner consulted Albert Valicenti, M.D., a psychiatrist, to prepare for the anticipated ad hoc review which the respondent Board of Education eventually frustated (Par. 19, supra). Dr. Valicenti summarized his conclusions as follows:

In brief, that there was no indication that Miss Newman war in any way incapacitated by psychological difficulties which required treatment.

A copy of Dr. Valicenti's letter of February 15, 1972, is hereto attached as "Exhibit 5".

21. By letter dated November 8, 1971, petitioner's father, Louis I. Newman, M.D., requested the respondent Board of Education to release petitioner's medical record, but such request was not honored. A copy of Dr. Newman's letter of November 8, 1971 is hereto attached as "Exhibit 6";

22. Dr. Newman's request of November 8, 1971, was the seventh in a series of requests all with appropriate releases by the petitioner, and all of which have to this date been disregarded by the respondent's Medical Bureau. Apart from the inference that the Medical Bureau's reports

do not warrant the placement of petitioner on medical leave (par. 18, mupra), such refusal conflicts with the contract right of a teacher who has been called for medical examination to have the report of such examination sent to the teacher's physician (Agreement between Board of Education and United Federation of Teachers, Article 4, subd. 72). The disregard of seven legitimate requests by the petitioner for proper release of her medical reports strongly evidences the respondent Board of Education's malicious intent.

23. On September 15, 1971, three months after the expiration of her forced leave of absence from September 11, 1970 to June 30, 1971, petitioner was belatedly required by the respondent Doard of Education's Medical Director, Sidney Leibowitz, M.D., to report for medical examination by the Board's doctors to determine her fitness to return to duty. A copy of Dr. Leibowitz's notice is hereto attached as "Exhibit 7".

Bureau for her medical examination on October 18, 1971 accompanied by Gladys Roth, United Federation of Teachers: Field Representative, one Dr. Lazarus examined the Board of Education's medical file and announced that there was no medical support for the orders placing the petitioner on

forced leave of absence. Dr. Lazarus thereupon noted on the file folder containing petitioner's medical report his recommendation that the petitioner be immediately reinstated. The petitioner thereupon entered the next examination booth where a second Board of Education doctor, whose name is unknown to petitioner, read Dr. Lazarus' recommendation and entered his concurrence in the presence of petitioner and Mrs. Roth.

Board of Education's physicians that petitioner be restored to duty (supra, par. 24), the respondent Board of Education by notice dated November 11, 1971, again required the petitioner to report to a panel psychiatrist, one Dr. Jack Schnee. A copy of the said respondent Eoard of Education's notice to report is hereto annexed as "Exhibit 8".

26. In consequence of the direction of the petitioner that she report to Dr. Shea, she consulted James E. Shea, M.D., a psychiatrist, a total of four times, from November 24, 1971 to February 21, 1972. Dr. Shea's report of February 25, 1972 concluded with the following findings and opinion:

Miss Neuman's basic personality structure is flexible, out-going, friendly and intirely lacking in morbidity. I would think that as a teacher she must be imaginative, lively, stimulating and conscientious.

In summary, I find no evidence of psychiatric disorder that would in any fashion interfere with her performance as a teacher. She is an extraordinary human being.

A copy of Dr. Shea's letter of February 25, 1972 is hereto attached as "Exhibit 9".

27. In direct violation of petitioner's right under the Education Law, Section 2568, to be accompanied by a physician of her choice at the medical examination directed by the notice of Hovember 11, 1971, Dr. Schnee, allegedly acting under instructions from Sidney Leibewitz, M.D., respondent Board of Education's Medical Director, refused to admit James E. Shea, M.D., the physician of her choice, to the examination.

respondent Board of Education arbitrarily extended petitioner's forced medical leave from September 10, 1971 through June 30, 1972, this time without any ecomencation whatseever because of the exhaustion of potitioner's sick leave. A copy of respondent Board of Education's direction of January 18, 1972 is attached hereto as "Exhibit 10". A copy of the respondent Board of Education's letter of January 17, 1972 quoting from the Medical Director's recommendation that potitioner's forced leave of absence be extended to June 30, 1972 is attached hereto as "Exhibit 11".

29. Upon information and belief, neither the medical reports obtained by the respondent's Medical Eureau, early in 2070 pader to the forced leave of absence from September A3, 2070 to June 30, 1971, nor medical reports obtained by said respondent subsequent to November 11, 1971 warranted at a determinations that potitioner is mentally or physically is sepable of performing her duties (aurus, pars. 13, 28). Accordingly, it appears that respondent Deard of Figuration's placement of petitioner on leave of absence constitutes a fraudulent determination without any medical support.

Board of Milication of the City School District of New York attach to the a ower-all medical reports in full pertaining to the potationer obtained by the Medical Europu subsequent to Mr. Gordon's report of January 26, 1970 requesting her medical examination.

31. Ever since September 11, 1970, petitioner has been ready, willing and able to perform her duties as a teacher.

32. The respondent Board of Education, has not preferred any charges against the potitioner, nor has it legally suspended her without salary since September 11, 1970.

38. By reason of the premines, the petitioner has been at all times since September 11, 1970 and still is

in respondent Board of Education's employ as a High School Teacher of Health Education.

34. Petitioner's forced medical leave of absence has been accomplished in violation of petitioner's due process and equal protection rights, and in disregard of her tenure rights which entitled her to a due process hearing on charges as a prerequisite to suspension. Education Law, Section 2573(5).

35. Mr. Gordon's "report" of January 26, 1970, made with malicious intent to ruin petitioner's professional reputation and career of twenty-six years' duration, recommending that the petitioner be required to submit to a medical examination and the determinations of the Medical Bureau that potitioner was mentally unfit to perform her duties were unwarranted, arbitrary, capricious and illegal.

36. An order to show cause is here requested because petitioner who has been irrevocably damaged and continues to be damaged, seeks a stay of the respondent Board of Education's order of January 18, 1972 (Exhibit 10) placing the petitioner on forced leave of absence until there has been a determination by this court as to the legal validity of such order.

37. No previous application for the relief requested herein has been made to any Court or Judge.

WHEREFORE, petitioner prays that the annexed order to show cause be granted staying the respondent Board of Education of the City School District of New York from continuing the petitioner on forced leave of absence until there has been a determination by this Court as to the legal validity of such forced leave of absence, and requiring the respondent Board of Education of the City School District of New York to show cause why an order should not be made herein:

- 1. Commanding and directing the respondent Board of Education of the City School District of New York to restore the petitioner to active teaching duties.
- 2. Commanding and directing the respondent
 Board of Education of the City School District of New York
 to rescind, cancel and withdraw the order of July 31, 1970
 heretofore issued placing the petitioner on forced leave of
 absence from September 11, 1970 through June 30, 1971.
- 3. Commanding and directing the respondent Board of Education of the City School District of New York, to rescind, cancel and withdraw the order of January 18, 1972 heretofore issued placing the petitioner on forced leave of absence from September 10, 1971 through June 30, 1972.
- 4. Commanding and adjudging that petitioner's accumulated sick leave days be restored to her for the

period of her forced leave of absence between September 11, 1970 and June 30, 1971, and that the sums paid to her be credited against the salary due her instead of against sick leave.

- 5. Commanding and adjudging that petitioner be paid her calary as a high school teacher in respondent Board of Education of the City School District of New York's employ from and after September 10, 1971 with interest on each monthly installment thereof from the date of accrual to the date of payment.
- 6. Commanding and directing the respondent
 Board of Education of the City School District of New York
 to serve with the answer to this petition all medical
 reports pertaining to the petitioner obtained by its Medical
 Bureau subsequent to the recommendation by her Principal,
 David Gordon, that she be given a medical examination.
- 7. Commanding and directing the respondents herein to cease and desist from any and all acts prejudicing the rights of petitioner insofar as such acts are contrary to due process, are intended to and do conspire against her contractual, legal and professional rights, and constitute severe and relentless harassment of petitioner.
- 8. Directing a jury trial if necessary to a favorable determination of the proceeding.

9. Granting the petitioner such other and further relief as the Court may deem just and proper in the premises.

WILLIAM GOFFEN Attorney for Petitioner 150 Eroadway New York, N.Y. 10038 At a Special Torm, Part I of the Suppose Court of the State of How York, held in and for the Court, house, 350 linus Street, in the Borough of Brooklyng City of How York, on the Court day of June, 1972.

PRESENT:

HOM. LOUIS B. HELLER,

Justice.

In the Matter of the Application

10.

FRANCINE NEWMAN,

| for a judgment jurguent to article 78 of the Civil Practice Law and Rules | WITH MO TOE OF | | | |
|---|----------------|------|------|----------|
| -agranst- | : | ğ. | | 1 |
| DAVID CORDON. PRINCIPAL OF WAR HOOMAHAY | | E E | 22 | 8 |
| MOAND OF EDUCATION OF THE CITY SCHOOL | : | MEXI | | ; |
| DISTRICT OF HOW YORK, | | | 3 | |
| Respondents. | -7 | | . "" | which we |

The petitioner herein having applied to this Court for a judgment pursuant to Article 78 of the Civil Practice Law and Rules (1) directing the respondent Board of Mucation of the City School District of New York to reptore the petitioner to active teaching duties, (2) directing the said respondent to rescind the order of July 31, 1970, placing the petitioner on Porced leave of absence from September 11, 1970 through June 30, 1971, (3) directing the said respondent

to reseind the order of January 18, 1972 placing the petitioner on forced leave of absence from September 10, 1971 through June 30, 1972, (4) commanding that petitioner's accumulated sick leave days be reptored to her for the period of her forced leave of absence between September 11, 1970 and June 30, 1971, and that the sums paid to her be credited against the balary due her instead of against pick leave, (5) commending that petitioner be paid her salary as a high school teacher in the employ of the respondent Board of Education of the City School District of New York from and after Coptember 10, 1971, with interest on each monthly installment thereof from the date of accrual to date of payment, (5) directing the said respondent to serve with the answer to the petition all medical reports pertaining to petitioner obtained by its Medical Dureau subsequent to the recommendation by her principal, David Cordon, that the be given a medical erraination, (7) directing the respondents to coose and desist from any acts projudicing the rights of the petitioner contrary to due proceen and intended to conspire against auditioner's contractual, legal and profeesional rights, (8) directing a jury trial if necessary to a determination of the proceeding, and (9) granting the patitioner such other and further relief as the Court may dem just and proper in the promises, and said application having duly come on to be heard before this Court,

NOW, on reading and filling potitioner's order to show cause dated March 2, 1972, the potition verified March 1, 1972, with proof of due service thereof upon the reeschients, and the embilits thereto assemed, and petitioner'd roply verified April 13, 1972 and the criditit and the affidavit of Dr. Dimmuel Pisher sworm to April 10, 1972, therete annexed, with proof of due carvire thereof upon the respondents, all in support of the motion and respondents answer verified April 4, 1972, together with the exhibite therete annexed, with proof of due cervice thereof upon the petitioner, in apposition to the motion, and the parties having submitted all necessary papers and due deliberation having been had thereon, and upon filling the opinion of the Court,

NOW on motion of WILLIAM CONFER, attorney for the petitioner, it is

and arifulged.

ORDERED, that the petitioner's application to annul the determination of July 31, 1970 placing the petitioner on forced leave of absence from September 11, 1970 to June 30, 1971 be and hereby is denied; and it is further

ORDERED that petitioner's application to restore potitioner's cumulative sick leave reserve for the period from September 11, 1970 to June 30, 1971, be and hereby is denied; and it is further

ORDERED that positioner's application to direct the respondent Board of Education to furnish all medical reports of its Medical Dureau subsequent to the recommendation by her principal, the respondent, DAVED COEDCH, that she be given a medical examination, be and hereby is denied; and it is further

ORDERED that the petitioner is not entitled to be accompanied by a physician or other person of her cwn choice when examined by the Medical Iureau of the Board of Education; and it is further

ORDERED that the part of the proceeding dealing with the determination of January 13, 1972, placing petitioner on forced leave of absence from September 10, 1971 to June 30, 1972, without pay from November 7, 1971, be remanded to the respondent Board of Education of the City School District of New York to consider the medical reports of petitioner's physicians and the reexamination of the petitioner if conducted as the basis for a new recommendation by the Deard's Medical Director concerning the restoration of the petitioner to active teaching duties.

ENTER

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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

In the Matter of the Application

of

FRANCINE NEWMAN, .

Pctitioner,

for a judgment pursuant to rticle 78 of the (1vil Fractice Law and Rules

-against-

DAVID GORDO, PRINCIPAL OF FAR ROCKAWAY: HIGH SCHOOL, QUILLES, NEW YORK and BOAFD OF HE CATTO OF THE CITY SCHOOL DISTRICT OF NEW YORK,

REPLY

Index No. 3727-1372

. . .

Respondents.

stitioner, by WILLIAM COFFEN, her attorney,

for her reply to the Answer herein, respectfully alleges:

of the Answer, positioner alloges that the rating of petitioner as a satisfactory on June 30, 1970 for the 1969-1970 school year has based on the same contrived allegations as are contained in Mr. Gordon's so-called Report of January 26, 1970.

2. In reply to the denials of paragraph "5" of the Answer, estitioner alleges that the failure of 75 students occurred in a class of 135 students, not 50 students, in the school year ending in 1966 for which the teacher was given a "satisfactory" rating, not curing the 1969-1970 school year.

Petitioner further alleges that such failures were in citizenship only and for the first marking period, not for the entire term.

Petitioner further alleges that such failures in citizenship were given in complete accord with Mr. Gordon's directions at the time to all of the faculty to fail students in citizenship for cutting classes, excessive absenteeism, disruptive behavior, etc.

3. In reply to the denials of paragraphs "9" and "10" of the Answer, petitioner alleges that the conclusion of the Medical Bureau of the Board of Education that the petitioner was mentally unfit for teaching duties was arbitrary, capricious and fraudulent in that the examination of petitioner by Dr. Morris Icenberg and Dr. Samuel Prencky did not varrant the conclusion that petitioner was mentally unfit to teach, as appears from the respondent Board of Education's refusal to reveal its medical records in support of the Arawer (Answer, par. 48) and the admissions of the Board of Education physicians that there was no medical support for the placing of petitioner on medical leave (Petition, par. 24).

4. In reply to the denials of paragraph "ll" of the Arswer, petitioner alleges that the Medical Director's fervent opposition to an evaluation of her health by an ad hoc committee of physicians on the specious ground that she had sick leave time is further evidence of the Medical Division's arbitrary, capricious and fraudulent medical evaluation of the petitioner's mental fitness to teach.

of the Answer, petitioner alleges that she dad supply to the Board of Education a release of her medical record to her father, Louis T. Newman, M.D., a copy of which release is hereto attached as "Exhibit 12".

6. Denies so much of paragraph "28" of the Answer as alleges that Mr. Gordon's Report contains factual justification for requiring a medical examination of the petitioner. The accord paragraph of the Report sets forth the unsupported conclusion that petitioner is embittered, hostile and alienated from most of her colleagues. There is no specification of any such colleagues. The Report containes that petitioner's judgment in professional areas are unusual and inappropriate, but does not specify the judgments or areas characterized. The Report makes the conclusory statement that petitioner has been responsible for an inordinate number of complaints and nasty pupil reactions, without specifications of a single complaint or pupil reaction.

The third paragraph of the Report terms the petitic er unreasonable and arbitrary in some of her demands, again without specification. There is no identification of students falsely charged with forging medical notes who have allegedly been berated "violently". Mr. Gordon conceals the fact that petitioner acting in her capacity as Medical Coordinator in the Health Education Department for several

years uncovered almost 200 forgeries of medical certificates. The same paragraph of the Report deceptively refers to a 1966 assignment of "U" ratings in citizenship as though it were current, refers to a class of 90 when there were actually 135 students, and gives the impression that Mr. Rommer was adversely critical when in fact he was complimentary of the petitioner's conduct (Exhibit 2).

The fourth paragraph of the Report is not only irrelevant to petitioner's mental capacity to teach but constitutes a highly insensitive and inappropriate commentary upon petitioner's private grief over her mother's death.

The assignment of assisting teachers, referred to in the fifth paragraph, is clearly dictated by department policy with which the petitioner had no power to interfere even if she wished. Petitioner did not scream at such teachers or at her pupils.

The Report in the sixth paragraph creates the false inference that petitioner customarily dismissed her students late and blames petitioner because a child fell and was hurt after late dismissal from the gym class. The child, Carol Freifeld, fell, but not because of late dismissal.

While petitioner did on an occasion refuse to engage in private conversation with the Chairman, this is no evidence of mental incapacity. It was a human reaction

to an earlier private conversation in which Mrs. Achepa told petitioner she was the "laughing stock of the school and sick, sick" because of a small tear in petitioner's panty hose occurring during demonstration of a modern dance to her pupils.

the seventh paragraph contains the conclusory statement that reports and complaints were made by staff members to the principal, but to this date not a single such complainant has been identified to the petitioner. At a meeting allegedly responsive to the unidentified complaints, there was not a single teaching colleague present, but eight administrative members of Mr. Gorden's own staff who took turns in derogating petitioner's personality. Petitioner was thus submitted to an unbearable ordeal of vilification by each of the administrators present. The Report refers to an unidentified pupil whom the petitioner 1s stated to have characterized as "sick". The girl happens to be known to the petitioner as a disturbed and disruptive youngster whose performances are detailed over the years by numerous file entries supplied by numerous teachers. The accusation of mimicking a foreign speaking parent was made falsely by alice Nirenberg, Acting Dean of Girls, one of Mr. Gordon's administrators, who dredged up the false accumpation for the first time five months after the alleged event on open school night. In view of the premises, petitioner's act in filing a grievance charging harassment is not a specification of fact warranting medical examination.

The Report refers in the eighth paragraph to a memorandum from the principal dated November 13, 1969 informing the petitioner that the mother of Robin Fourstein requests that she be taken out of petitioner's Mygiene class (Exhibit A annexed to the Report attached to the Answer). Ever since the meeting with Mr. Gordon's administrators at which she was unmorcifully castigated, petitioner has been accompanied on visits to the principal by a UFT representative pursubnt to the advice of Vincent Speranza, Director of Stoff of the UF?. At the particular meeting concerning Robin Feuerstein, petitioner was accordingly accompanied by Mr. Gorewitz, a UFT representative, and the principal was accommended by Lillian Weldenbaum, an Assistant Principal. Mr. Gordon condemned petitioner for having given an initial grade of 65% to Robin Feuerstein, although her mother thought it should be a higher grade. By the end of the term Robin carnet and received a better grade and volunteered to petitioner that she enjoyed being in her class and that Mr. Gordon and her parents were friends.

The main thrust of the Report at paragraphs
ninth and tenth, concerns Mr. Gordon's vicious and distorted
version without personal knowledge of an accidental tearing
of petitioner's panty hose while demonstrating to her class,
an incident for which petitioner cannot reasonably be blamed
and having no relationship to mental fitness to teach or
otherwise. Petitioner's costume was conventional for a
gym teacher, consisting of a blouse and jumper, panty hose

colleagues would be informed of her grievance against Mr.

Gordon and Mrs. Abhepa. Mr. Gordon or his agents removed
the poster, cut it in half, removed a strip from the center
part of the poster and submits a photostat of these mutilated
parts in this incomprehensible form as Exhibit C, as supportive of his assertion that petitioner is mentally unfit
to teach. Actually, the poster in its unmutilated form was
a clear and appropriate presentation to Miss Newman's
colleagues of her legitimate grievance. What Mr. Gordon
has done to petitioner's poster in dramatically consistent
with the numerous distortions contained in his Report.

While petitioner distributed the mimcographed sheet (Exhibit D) in the Teachers' Cafeteria and showed the torn penty hose to certain of her colleagues as evidence that it was a trivial tear and much ado about nothing, such facts do not support the contention of mental unfitness to teach.

In the light of the malicious treatment of petitioner by Mr. Gordon and Mrs. Ashepa in connection with the panty hose incident (wee letters of November 14, 1969 and of January 20, 1970, attached to respondent's Exhibit A as Exhibits B and E), petitioner's amusing role playing technique to minimize in this constructive way the impact of the cruel treatment to which she was subjected certainly is not evidence of mental unfitness.

Mr. Gordon's letter marked Exhibit E (attached to Exhibit A) condemns petitioner because a pupil expressed support for petitioner, a teacher of 25 years' standing. Mr. Gordon's celticism is astonishing in view of the numerous letters he has solicited from students and parents to exceriate petitioner.

7. Decides so much of paragraph "29" of the Ancwer as implies that the Education Law, Section 2568 or the By-Laws of the Board of Education, Section 106, authorized the medical examination of the petitioner on the besis of Mr. Gordon's so-called "Report".

8. Denies knowledge or information sufficient to form a belief as to medical recommendations described at paragraphs "30, "31" and "32" of the Answer, and respectfull moves the Court pursuant to CPLR Section 7804(e) to direct the respondent Board of American to supply the defect in the Answer by submitting the full medical resords pertaining to petitioner.

9. With vefer med to paragraphs "33" and "34" of the Arawer, moves pursuant to CPIM esection 7004(f) to strike the Medical Director's report of July 7, 1970 (Respondents: Exhibit D), because the addical reports of the physicians and perchologist who actually examined the potitioner on which Exhibit D our orts to be based have not been submitted to the Court.

10. Decides the allegations of paragraph "37" of the Inquer.

as distorts by means of out of context quotations the meaning of Dr. Emanual Fisher's report of October 26, 1970 and respectfully refers the Court to the report itself (Exhibit E) for its true meaning and for its complete encorsement of petitioner's mental fitness to teach, as follows:

There is no indication that Miss N is in any way inespecitated by psychological difficulties which require treatment. There are, also no test indications that Miss N is in any way incapable of performing any occupational task whatsoever for which she is qualified by training and experience.

See offidavit of Dr. Emanuel Fisher hereto attached in which he corrects the distortions of his report in paragraph "37" of the inswer.

In any event, Dr. Fisher's report of October 26, 1970, may not properly be cited by the Board of Education in justification for originally placing petitioner on forced medical leave in July, 1970 (Exhibit 3).

In view of Dr. Fisher's conclusion that psychological testing establishes that Miss Newman is not "in any way incapable of performing any occupational task whatsoever for which she is qualified by training and experience," and on the basis of Dr. Valicenti's own findings, Dr. Valicenti

Similarly concluded "that there is no indication that Miss Newman is in any way incapacitated by psychological difficulties which require treatment" (petitioner's Exhibit 5). Dr. Shea more recently concluded (Exhibit 9):

In summary, I find no evidence of psychiatric disorder that would in any fashion interfere with her performance as a teacher. She is an extraordinary human being.

12. With reference to paragraphs "38" to "48" of the Answer, petitioner alleges that the so-called "Report" (Exhibit H) of the Medical Division, is not a report at all of petitioner's medical condition, but a conclusory statement by a doctor who did not examine the petitioner and who does not reveal the diagnoses, records, reports and recommendations of the examining doctors on which he allegedly bases his opinions. Pursuant to CPLR, Section 7804(e), petitioner requests that this Court order the Board to supply the defect or omission" in the Inswer with full medical records.

13. With reference to the allegations of paragraphs "49" to "55" of the inswer, petitioner alleges that the contention of the Board of Education that her accumulation of 200 days of sick leave due to an extraordinary attendance record justifies depriving her of the contractual

right (UFT Contract, Article TV F21), to an impartial medical review of the respondent Board's arbitrary determination that she is mentally unfit to teach is reflective of the Board's conspiracy with respondent Gordon to comply with his wishes regardless of justification.

of the facuer, and affirmatively alleges that the Education Law, Section 2568, in its provision for protection of the teacher who is required to bubmit to medical examination that she may be accompanied by a physician or another person of her own choice, may not reasonably be interpreted as inapplicable to any of the medical examinations required by the Foard for purposes of determining mental fitness to teach.

15. Denies so much of the allegations of paragra, he "61" of the insuer as allege that Drs. Lazarus and Cinque "indicated they felt that petitioner should be examined by a parel psychiatrist" and respectfully move that respondents be directed to supply the full medical records pertaining to petitioner.

to the effect that Drs. Lamarus and Cinque recommended and Dr. Lei owitz concurred, upon the baris of Dr. Schnee's report of her examination, that petitioner is "not fit" for resumption of duty, and respectfully move that the respondent Board be directed to furnish the full medical records

including those prepared by Drs. Schnee, Lazarus and Cinque, together with Dr. Leibouita's concurrence.

17. Denies the allegations of paragraphs "64" and "65" of the Answer and affilmatively alleges that respondents: actions are arbitrary, capricious, unreasonable and illegal in requiring her to report for medical examination on the basis of Mr Gordon's so-called "Report", in declaring her mentally unfit for duty since September, 1970, without producing any medical records justifying such declaration, in refuging to permit an impartial medical review by an od hoe committee of physicians as authorized by the UFT contrast (Article 4 F21), in refusal to release to petitioner the modical records pertaining to her case as authorized by the UFP contract (Article 4 F21), in excluding the physician of her choice from her medical examination as authorized by Education Law, Section 2568, in distorting at paragraph #37" of the answer Dr. Emenuel Fisher's unequivocally favorable recommendation that petitioner is fit to perform her dulles, and in omisting from the Answer the Board's full medical reports on the petitioner.

18. Denies the allegations of paragraph "69" of the Anguer and affirmatively alleges that the four months statute of limitations has not begun to run because of the continuing group perpetrated against the petitioner in perpetrating her forced leave of absence without pay in dispegard of the Board of Education's plain duty to rectore

her to service. Matter of Control School District #2 v. New York Strike Meachers! Rodizenon's System, 23 N.Y.2d 213.

- 19. Denies the allegations of paragraph "72" of the Ancyer and offirmatively alleges that the arbitrator's award sustaining respondents' arbitrary and capricious denial of an impartial medical review does not weaken petitioner's in tent proceeding for judgment of this Court:
- 1. Commanding and directing the respondent Board of Education of the City School District of New York to restore the petitioner to active teaching duties.
- 2. Commanding and directing the respondent Board of Education of the City School District of New York to rescind, cancel and withdraw the order of July 31, 1970 heretofore issued placing the petitioner on forced leave of absence from September 11, 1970 through June 30, 1971.
- 3. Commading and directing the respondent Board of Education of the City School District of New York, to rescand, cancel and withdraw the order of January 18, 1972 heretofore issued placing the petitioner on forced leave of absence from Esptember 10, 1971 through June 30, 1972.
- 4. Commanding and adjudging that petitioner's accumulated sick leave days be restored to her for the period of her forced leave of absence between September 11, 1970 and June 30, 1971, and that the sums paid to her be credited against the salary due her instead of against sick leave.

5. Commanding and adjudging that petitioner be paid her salary as a high school teacher in respondent Board of Education of the City School District of New York's employ from and after September 10, 1971 with interest on each monthly installment thereof from the date of accrual to the date of payment.

of Education of the City School District of New York to serve with the answer to this potition all medical reports pertaining to the petitioner obtained by its Medical Eureau subsequent to the recommendation by her Principal, David Gordon, that she be given a medical examination.

7. Commanding and directing the respondents herein to cease and desist from any and all acts prejudicing the rights of petitioner insofar as such acts are contrary to due process, are intended to and do conspire against her contractual, legal and professional rights, and constitute severe and relentless harassment of petitioner.

8. Directing a jury trial if necessary to a favorable determination of the proceeding.

9. Granting the petitioner such other and further relief as the Court may deem just and proper in the premises.

WILLIAM GOPFEN Attorney for Petitioner 150 Broadway New York, N.Y. 10038 SUPPRETE COURT OF THE STATE OF NEW YORK COURTS OF TERRS

In the Matter of the Application

of

FRANCIUS DEWMAN.

Petitioner.

for a judgment pursuant to Article 78 of the Civil Proctice Law and Rules

APPIDAVIT

:

:

-against- .

DAVID CONDON, PRINCIPAL OF FAR ROCKAWAY . HECH SCHOOL QUESTS, NEW YORK and DOARD OF EDUCATION OF THE CETY SCHOOL DISTRICT OF NEW YORK,

Rem endents.

COUNTY OF REM YORK } SS.:

DR. EMANUEL FISHER, being Guly sworn, deposes and says:

PRANCEND HE MAN'S application for restoration to full teaching duties and as a corrective to the apparently naive and simplicatic distortions of paragraph "37" of respondents.

Leatements in paragraph "37" drawn from my paychological report have been taken out of context and thus lend
themselves to inferences which flatly contradict the conclusions drawn from the test data and fully communicated in
the psychological report.

officiency is significantly impaired because of "a combination of depression, anxiety and self involvement", belies the previous statement in the same paragraph to the effect that she functions more within the bright-normal range of intelligence with a full scale EQ of 115. It should not be necessary to add the psychological truism that the essentially unexceptionable rule is that few if any are able to score at the level of their potential on intelligence tests so that a discrepancy between potential and performance cannot be used to make psychological inferences without taking into considerations factors; all of which, incidentally, are fully detailed in my full psychological report.

2. Statements with respect to Miss N's temperamental and characterological patterns, energy, self involvement and hedonism have no pejorative or judgmental implications when used in the context of psychological evaluations. In the report they are explicitly disassociated from the implications they have been lent by being torn out of context by the statement in the same paragraph where the terms "narcisatic and hedonistic" first appear: "... there is no evidence of any significant neurotic symptomatology."

3. The statement to the effect that the report states that Miss N "is relatively insensitive to others because of naive self-involvement" leaves out the immediately preceding qualifications, "At worst, she might be understood

to be relatively indensitive to others because of her naive self-involvement." The full statement is in the nature of a speculation dealing with appearance whereas out of context it seems to suggest a flat assertion representing a conclusion as to a matter of fact.

4. Miss N's rigidity" which is perceived to be disabling when taken out of context and is implied to be a pathological trait is, in the report, related to a strong adherence to a rather conventional view of social and sexual relations, but a conventionality which is somewhat at odds with the current trend to more relaxed sexual mores. This descrepancy between her naive conventionality and the currently from mores of the community may indeed throw her rigidity into sharper relief, but one would hardly see this kind of rigidity as disabling or pathological.

5. Whatever implications may be drawn from pieces of statements and fragments of phrases torn out of centert, the survey and concluding statement of the report based on all the data is as follows:

There is no indication that Nice N is in any way indepositated by paychological difficulties which require treatment. There are, also no test indications that Miss N is in any way increable of performing any cook the all task whatsoever for which she is qualified by training and experience.

Sworn to before me this 10th day of April, 1972.

Dr. Monuel Fisher

WHILEM GOVERN
NOTARY DOLLOWS, S. ON NEW YORK
PA. 03-11-2075
Qualities to Kings County
Commission Expired March 20, 1075

COUNTY OF NEW YORK } SS.:

FRANCIME NEWMAN, being duly sworn, deposes and says that deponent is the Petitioner in the within proceeding; that deponent has read the foregoing Reply and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me this

Francine Newman

WILLIAM COFFEN

NO. OF 1408675

Outstied in Mings County

Commission Expires March 30, 1973

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 31, 1972.

July 31, 1972. HOM. SAMUEL RABIN. Presiding Justice HON. JAMES D. HOPKINS HON, FRED J. MUNDER HON, M. HENRY MARTUSCELLO HON. HENRY J. LATHAM and the first section of the section ALCONDON WOOD AND FORMAN DEFENDANT'S Associate Justices EXHIBIT XVI ON MOTION FOR July Marking Compare SUMMARY JUDGMENT the state of the s In the Matter of FINITURE HEALTH, CID Petitioner, Order MANTE GOTDON et al., Recondents.

In the above entitled count, the above-named FRANCINE NERMAN, potitioner, taving moved in this court for 1 ave to appeal from an intermediate order of the Supreme Court, Kingo County, dated July 6, 1972, and for other relief:

Now, when the papers filed in support of said motion and he papers filed in apposition thereto; and the motion having been duly much little dark due deliberation having been had thereon, it is:

ORD ATT that the motion is bereby denied.

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E:

J M SELKIN

Clerk of the Appellate Division

OFFICE OF PERSONNEL - MEDICAL DIV -ION
68 COURT STREET, BROOKLYN, N. Y. 11201

MEDICAL DIVISION

F### : 595-6050-1-2

Dear illen:

October 20, 1072

Will you kindly call at my office, Room 201, on Harday, Oncober 30, 1972 be 2:6) and 5:00 P.M. for examination in connection with your fitness to return the contest you.

Plan Menicano Harman 1-1-40 70th Read Mercae Bills, N.Y. 11375

For Rockway NO -Q

DEFENDANT'S EXHIBIT XVII ON MOTION FOR SUMMARY JUDGMENT

Very truly yours,

Sidney Leibowitz, M. D. Medical Director

MEMORANDUM

SUPREME COURT KINGS COUNTY

SPECIAL TERM PART I

_____X By

HELLER,

In the Matter of the Application of Dated

JANUARY 5, 1973

FRANCINE NEWMAN,

Petitioner,

DEFENDANT'S EXHIBIT XVIII ON MOTION FOR SUMMARY JUDGMENT

J.

for a judgment pursuant to Article 78 of the CPLR

- against -

DAVID GORDON, Principal of Far Rockaway High School, Queens, New York, and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Respondents

WILLIAM GOFFEN, ESQ. for the Petitioner 150 Broadway New York, New York 10038

NORMAN REDLICH, ESQ. (Mary P. Bass, Assistant Corporation Counsel) Corporation Counsel Municipal Building New York, New York 10007

In this Article 78 proceeding, the petitioner seeks an order granting leave to renew a prior motion upon the ground of new evidence since the making of the prior motion on March 2, 1972.

The prior motion was to annul two determinations by respondents and further incidental relief. The first determination made on July 31, 1970, pursuant to the procedure provided in Education Law Section 2568, placed the petitioner on leave of absence from September 11, 1970 through June 30, 1971. second determination made on January 18, 1972, upon petitioner's application to the Medical Director for a medical examination

for reinstatement to duty and termination of her leave status, pursuant to Section 106-7(a) of the by-laws of the Board of Education, placed her on leave of absence from September 10, 1971 to June 30, 1972 without pay from November 7, 1971, which date was one month after the expiration of her cumulative absence reserve on October 7, 1971.

This court denied the prior motion with respect to the determination made on July 31, 1970 and held, inter alia, that the report of the principal to the Chancellor, pursuant to Education Law Section 2568, recommending a medical examination of the petitioner was sufficient in its statement of the facts and

circumstances upon which the recommendation was predicated. The part of the proceeding dealing with the determination made on January 18, 1972 was remanded with the direction that respondent make a redetermination upon an adequate record.

The following is alleged to be the new evidence:

The principal's report to the Chancellor mentioned a "panty hose" incident stated to have occurred while petitioner was demonstrating exercises to her physical education class. A letter dated November 14, 1969 from the Acting Chairman to the petitioner concerning the incident had been placed in her file following a meeting at her request on November 13, 1969 attended by the principal, the petitioner and a union representative. The petitioner filed a grievance claiming the letter should be removed from her file. At the appeal step of the grievance procedure, the first paragraph of the letter was modified. The petitioner was not satisfied with that disposition and the matter was appealed to arbitration.

On August 25, 1972, subsequent to this court's decision on May 17, 1972 on the prior motion, the arbitrator made an award sustaining the grievance and determined that the letter as modified conveyed inferences which were inaccurate and unfair and recommended that the letter be removed from the petitioner's file.

The petitioner contends that this alleged new evidence renders the principal's report insufficient. The contention is without merit. The removal of the letter from the petitioner's file and the deletion of the "panty hose" incident from the report

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still leave the other matters set forth in the principal's report sufficient to fulfill the essential qualities of the report required by Education Law Section 2568. Further, the award is irrelevant because the July 31, 1970 determination placing the petitioner on leave of absence was made by respondent Board of Education on the recommendation of the Medical Director and not by the principal of the school. The arbitrator's award is unrelated to the medical determination.

The court reiterates what it said in its prior decision:
"Whether a medical examination should have been directed is not for determination by this court (Application of Munter v. Theobold, 225 N.Y.S. 2d 1009, affd. 17 A D 2d 854 (lv. to app. den. 12 N Y 2d 645]). There was a reasonable basis for the determination made and the court may not substitute its judgment for that of the respondents (Matter of Fallon v. Board of Higher Education of the City of New York, 9 A D 2d 766; Matter of Groves v. Board of Education, 175 Misc. 205, 208, affd. 261 App. Div. 1115)."

Accordingly, the motion for renewal of the prior motion is granted, and upon renewal, the motion is denied. The stay granted is vacated.

Settle order.

Louis B. Heller J.S.C.

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REME COURT

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COUNTY

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HIMMELIK. J.

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VID COPPOS, PATHOLPAR OF FAR

CHAMAY UTON SOMOON, QUILING, HEN

DEFENDANT'S EXHIBIT XXIX ON MOTION FOR SUMMARY JUDGMENT

RIGHT AND CONTROL AND CASTLESS FOR STAIN OF STAIN OF STAIN 2006 DISSERTOR OF HEW YORK, Respondents

Maan conven, reg. tornay for Patitioner o feroaduay

Tyork, New York 10033

J. DEE RAISTEN, ECO. Corporation Common of the Ciny of Hew York Attorney for Respondents

Municipal Callding New York, Men York 10007 In this Article 76 proceeding the petitioner seeks an order

annulia; the determination made on July 31, 1970 placing the Ationer on leave of absence from Reptember 11, 1970 through June 30, 1. (2) annuling the determination made on January 18. 1972 pleasing patitioner on leave of absence from September 10, 1971 through to 30, 1972, (3) directing that petitioner's accumulated sick leave restored to her for the period from September 11, 1970 through e 30, 1971, (4) directing that respondents attach to their answer all tool reports of the Medical Eureau subsequent to her Principal's ormendation that she be given a medical examination, and for other idental rollef.

Petitioner is a teacher of Health Education at a high school. commenced her service in 1945 as a substitute and was appointed a ular teacher in 1952.

On January 25, 1970 a request was made by her Principal that be given a medical examination. The request the CORY AVALABLE ort setting forth the facts and circumstances justifying the request.

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ede that she be given a leave of absence for purpose of health improveent for the following school year, from September 11, 1970 to June 30, 071. On July 31, 1970 who was placed on leave of absence for that bried and adviced that her cumulative absence reserve was sufficient to over the number of days involved. The letter further informed her that t would be necessary to have the prior approval of the Medical Bureau effore she resured her school duties.

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On September 8, 1971 the petitioner requested a medical amination for reinstatement to duty. She was reexamined by the adical Bureau on October 13, 1971, November 18 and 29, 1971, and a commendation was made that she again be given a leave of absence for the period from September 10, 1971 to June 30, 1972. By latter dated amary 18, 1972 she was placed on leave of absence for the second school ar. This time she was further advised that her cumulative absence serve expired on October 7, 1971 and she would be on leave of absence thout pay as of Movember 7, 1971, one month after the expiration of a cumulative absence reserve on October 7, 1971.

Section 2568 of the Education Law provides that the Superintendent Schools (now Chancellor) may require an employee to submit to a medical amination when recommended in a report, in writing, that such examination should be made; the report must be made by the supervisor of the player.

Petitioner contends that the report of the Principal was

set forth the facts and circumstances upon which the recommendation the medical examination was predicated (Matter of Great v. Januar, Misc 2d 741). The specific actions of the teacher, as stated by the neighbor, were sufficient to support the recommendation made. Unether edical examination should have been directed is not for determination this court (Apolication of Muster v. Theodolf, 225 N.Y.S. 2d 1899, d. 17 A D 2d 854). There was a reasonable basis for the determination and the court may not substitute its judgment for that of the pendents (Matter of Fellog v. Egerd of Misper Education of the Gity Jen York, 9 A D 2d 766; Natter of Groves v. Board of Education, 175 L. 205, 200, affd. 251 App. Div. 1115).

The petitioner asserts that she was denied her contractual its to a review by an ad hoc committee of physicians. After being sed on leave of absence on July 31, 1970 and being compelled to just her cumulative absence reserve to cover the period involved, the tioner was denied the right to a review by an ad hoc committee of sicians.

The collective bargaining agreement between the respondent, of of Education, and the United Federation of Teachers, Article IV, sion F, subdivision 21, provides in part as follows:

"A regular teacher shall have the right to an independent evaluation by an ad hoc committee of physicians if the finding of the Medical Division to the Superintendent has resulted in: (1) placement of the teacher on a leave of absence without pay for more than three menths, or (2) termination of the teacher's services, or (3) a recommendation for disability retirement."

Respondent denied the petitioner's request for an ad hoc review committee because for the 1970-71 school year she had sufficient days in her cumulative absence reserve to cover the medical leave period and she did not fit into any of the three enumerated categories. The Union thereupon brought a grievance. Again on November 25, 1970 the Deputy Superintendent stated in writing that she was not entitled to an ad hoc review because there was no payless period of more than three months involved. An appeal was taken to the Chancellor, who denied the appeal on January 20, 1971.

pretation of the ad hoc review clause in the contract was submitted to an arbitrator by the Union and the respondents. The Union did not argue the legality of section 105-7A of the Board's by-laws or the action of the Board in compelling the petitioner to exhaust her cumulative absence reserve. The court notes that while the arbitration proceeding was pending it was decided that the respondents had the power to compel the teacher to exhaust her sick leave reserve when compelled to go on a leave of absence pursuant to by-laws section 105-7A

(Modes v. Round of Education, 29 N.Y 2d 505). The arbitrator rendered his award on September 28, 1971 denying the Erlevance and upholding the position of the respondents.

In any event, the letter dated July 31, 1970 was a determination placing her on inactive status and granting a leave of absence. She embausted her administrative remedies with respect to that determination on September 28, 1971, the date of the arbitrator's award. This proceeding was commenced on March 2, 1972. There was no compliance with the four -month period of limitation set forth in CPLR 217 (Newtor of Manolitano v. Marchy, 28 A D 28 852; Matter of Alliano v. Adams, 2

A D 28 532, affd. 3 N Y 28 201; Matter of Coledney v. New York Coffee and Sugar Exchange, Inc., 2 N Y 28 149).

Petitioner contends that she is entitled to all medical reports of doctors in respondents! Medical Eureau subsequent to the Principal's request that she subuit to a medical examination. The collective bargaining agreement (Art. 4F, 21) provides:

"The report of the Medical Division on a teacher who was called for examination shall, upon written request of the teacher, be sent to the teacher's physician."

The language is clear. Neither a teacher nor her union is entitled to a medical report. The record reveals that a medical report was in fact sent to the petitioner's physician. Aside from the contract, no statute or law gives her the right to examine the various medical reports submitted by physicians of the Board of

Education (Silverman v. Moss, 107 N.Y.S. 2d 475; Kroof v. Board of Education, 34 Misc 2d 8, afrd. 18 A D 2d 919). The case of Sherman v. Hoffman (192 N.Y.S. 2d 214) relied on by petitioner, is distinguishable. That case involved an examination before trial of a witness in a libel action.

There remains for the court's consideration the determination of the respondent made on January 18, 1972 placing her on a leave of absence from September 7, 1971 through June 30, 1972. The record is incomplete as to this phase of the application. Paragraph 61 of the Board's answer alleges that at the examination on October 18, 1971, the initial impression of two of its doctors was that petitioner was not to return to duty; they felt she should be examined by a psychiatrist and reserved judgment pending a psychiatric determination; and that the decision as to whether a teacher is fit to return to duty is made by the Director of the Medical Division and not by staff physicians.

Paragraph 62 of the answer alleges that petitioner was examined on November 18 and 29, 1971 by a psychiatrist who found petitioner's illness still present and recommended that "she is not fit" for resumption of duty; and the recommendation was concurred in by the Director of the Medical Division. The reply denies so much of the allegations of paragraph 61 of the answer as allege that the two physicians "indicated they feel that petitioner should be examined by a panel of psychiatrists" and denies the allegations of paragraph 62 with respect to the recommendation made.

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The respondent has not submitted to the court eny medical report by its Director of the Medical Division containing findings howing that petitioner was not fit to return to duty. The letter of denuary 17, 1972 from the Executive Director of the Division of ersonnel Services merely states a conclusion. On the other hand, petitioner submits the reports of two doctors dated February 15, 1972 and February 25, 1972. They state in substance that there is no evidence of any paranoid or psychotic thinking, personality problems, psychological difficulties or any psychiatric disorder that would interfere with her performance as a teacher. In the present state of this record those cases holding that the mere existence of differences in opinion as to petitioner's ritness would not warrent a conclusion that the determination of respondent to act on the advice of its own medical staff was arbitrary or capricious (Matter of Strauss v. Hennig, 265 App. Div. 662, effd. 281 N.Y. 612; Matter of Adams v. Board of Education, 286 App. Div. 868, leave to appeal denied 309 N.Y. 1032; Matter of City of New York v. Schoock, 294 N.Y. 559) are not applicable.

In the circumstances here shown, the action of the respondent should be supported by an adequate record to establish that there was a reasonable basis for placing the petitioner in the status of an inactive employee without pay from November 7, 1971. The duty to make the determination is that of the respondent. The function of this

remaind and upon remaind the medical reports of petitioner's physicians if the reexamination of petitioner, if conducted, should be considered as a new recommendation made by the Medical Director to the respondent (of Porman v. State Liquor Authority, 17 N Y 2d 22%).

The court holds, contrary to patitioner's claim, that she is not emblitted to be accompanied by her own physician or other person of her own choice when examined by the Medical Dureau pursuant to section 106-7A of the Poard's by-laws.

Accordingly, the court makes the following disposition:

The notion (a) to annul the determination made on June 31, 1970 placing the petitioner on inactive status and granting her leave of absence, (b) to direct that her cumulative sick reserve be restored to her for the period from September 11, 1970 and June 30, 1971, and (c) to furnish all medical reports of the Medical Bureau subsequent to her Principal's recommendation that she be given a medical examination, is desied. The part of the proceeding which does with the determination made on January 18, 1972 placing her on leave of absence from aptember 10, 1971 to June 30, 1972 without pay from November 7, 1971 remanded and a redetermination is to be made by respondent upon a adequate record in accordance with this decision.

Settle order on notice.

